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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Greenville County
The Honorable D. Garrison Hill, Trial Judge
The Honorable Carmen T. Mullen, PCR Judge

Appellate Case No. 2020-000442

GARY R. THOMPSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issue Presented

Did the PCR court err by ruling, in petitioner's trial for criminal sexual conduct with a minor first degree (CSC, minor-1st), that petitioner was not prejudiced by defense counsel's failure to preserve for appellate review his pretrial objections to petitioner's prior conviction for CSC, minor-1st and his status as a sex offender being revealed to the jury where petitioner's pre-trial stipulations to those elements of the offense were only meant for sentencing purposes if petitioner were convicted of the underlying offense, and counsel waived the appellate issue by not objecting to publication of the stipulation before the jury?

Respondent's Counterstatement of Issue Presented

Did the PCR court correctly find that Petitioner failed to prove that his defense attorney was constitutionally ineffective for not preserving for appellate review the issue of bifurcation when the professional norms prevailing at the time of Petitioner's trial did not require that trial counsel request bifurcation and when trial counsel was not required to anticipate the change in law and procedure made by this Court in its opinion in State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019)?

STATEMENT OF THE CASE

Gary R. Thompson (“Petitioner”) is presently confined in the South Carolina Department of Corrections. The Greenville County Grand Jury indicted him during its November of 2013 term for disseminating obscenity to a minor and first-degree criminal sexual conduct with a minor. Petitioner was represented by Randall L. Chambers (“trial counsel”), Esquire. On January 13-15, 2014, Petitioner proceeded to a jury trial with the Honorable D. Garrison Hill presiding. At the conclusion of trial, the jury found Petitioner guilty as indicted. Judge Hill sentenced Petitioner to imprisonment for life without parole for first-degree criminal sexual conduct with a minor and for a consecutive term of five years imprisonment for disseminating obscenity to a minor.

Trial counsel filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense represented Petitioner on appeal. Petitioner argued that Judge Hill erred in declining to require the State to stipulate that Petitioner had a prior conviction for a crime listed in South Carolina Code Annotated Section 23-3-430. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Thompson, Op No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015) (per curiam), cert. denied, State v. Thompson, S.C. Sup. Ct. Order issued November 9, 2016. The remittitur was issued on November 14, 2016.

Petitioner filed his application for post-conviction relief on October 13, 2017. Respondent made its return on January 17, 2018, moving for a more definite statement and requesting an evidentiary hearing. An evidentiary hearing was convened at the Greenville County Courthouse before the Honorable Carmen T. Mullen on April 17, 2018. Petitioner was represented by Susannah C. Ross, Esquire, and Assistant Attorney General DeShawn H. Mitchell represented

Respondent. Judge Mullen issued an Order of Dismissal on July 24, 2019,¹ denying the application and dismissing it with prejudice. Petitioner filed a motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCR, on August 8, 2019, arguing therein that: (1) each of Petitioner's allegations was shown to be an instance of the constitutionally ineffective assistance of counsel, (2) the cumulative effect of the errors alleged by Petitioner constituted the constitutionally ineffective assistance of counsel, (3) Judge Mullen failed to consider State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), when finding that trial counsel was not constitutionally ineffective for failing to object contemporaneously to the stipulation of Petitioner's prior conviction for criminal sexual conduct with a minor, and (4) Judge Mullen failed to consider Cross when finding that trial counsel not constitutionally ineffective for failing to request that Petitioner's trial be bifurcated to avoid the fundamental unfairness of the jury's knowing of Petitioner's prior conviction for criminal sexual conduct with a minor. Respondent filed a return to Petitioner's motion on September 20, 2019. On February 26, 2020, Judge Mullen issued an order denying Petitioner's motion in part and granting it in part. Specifically, Judge Muller's order granting the motion insofar as the Court had not taken Cross into consideration when issuing the Order of Dismissal but denying the motion because Petitioner failed to prove that he was entitled to post-conviction relief even when Cross was taken into consideration.

Petitioner's appeal follows.

¹ The Order of Dismissal indicated on the final page that it had been issued on July 24, 2018; however, Judge Mullen's later order denying Petitioner's motion to alter or amend in part and granting it in part clarified that this was a typographical error and that the Order of Dismissal was actually issued on July 24, 2019.

STATEMENT OF FACTS

In 2010, the victim (“Victim”), who was nine years old at the time, falsely alleged at the behest of her mother, Jessica Taylor (“Mother”), that Victim’s paternal uncle had sexually abused her. App. 138, 245, 281-82. In response, Victim was referred to the Children’s Advocacy Center in Spartanburg, South Carolina, and met with Tricia Austin, a licensed professional counselor at the center, on June 15, 2010. App. 279, 281-82. During Austin’s meeting with Victim, Victim admitted that her paternal uncle had never sexually abused her. App. 145, 307. However, Victim spontaneously disclosed that she had been sexually abused many times by Petitioner, her stepfather. App. 286-88, 294, 306, 309.

Following Victim’s disclosure, Austin reported the allegations to Lieutenant Ty Miller of the Greenville County Sheriff’s Office, and he began an investigation into the reported sexual abuse. App. 168-68, 288-89. As a result of the investigation, Petitioner and Mother were arrested in September of 2010. App. 175, 177. Lieutenant Miller then obtained a search warrant for Petitioner’s home and discovered pornography consistent with the pornography Victim had described being shown to her by Petitioner during the time period she was being abused. App. 135, 177-80.

Subsequently, Petitioner was indicted for first-degree criminal sexual conduct with a minor and disseminating obscene material to a minor, and he proceeded to trial. App. 46-48. At the outset of trial, trial counsel moved for Judge Hill to preclude the solicitor from prosecuting Petitioner for first-degree criminal sexual conduct with a minor pursuant to S.C. Code Ann. § 16-3-655(A)(2) because trial counsel contended there was no question that Petitioner could instead be prosecuted pursuant to S.C. Code Ann. § 16-3-655(A)(1) in light of the fact that Victim was unquestionably

under the age of the eleven when she was sexually abused. App. 7-8. In response, the solicitor indicated that she was entitled to proceed forward with the prosecution under any theory supported by the evidence just as a prosecution for first-degree burglary involving prior convictions as an aggravating circumstance would be permitted to go forward even if other aggravating circumstances could also be proven aside from the existence of two or more prior qualifying convictions. App. 9-12.

Following the solicitor's remarks, trial counsel again urged Judge Hill to force the solicitor to prosecute Petitioner for a violation of S.C. Code Ann. § 16-3-655(A)(1) instead of a violation of S.C. Code Ann. § 16-3-655(A)(2). App. 12-14. However, in the event that Judge Hill would not do so, trial counsel asked Judge Hill to permit trial counsel to stipulate to the existence of Petitioner's qualifying prior conviction while also precluding the solicitor from presenting that stipulation to the jury. App. 13-14, 17. In response, the solicitor asserted the South Carolina Supreme Court had previously rejected a similar argument the State could be forced to stipulate to an element in the context of first-degree burglary. App. 14-15. However, the solicitor offered to stipulate to the prior conviction in Petitioner's case while noting the stipulation had to be presented to the jury due to the fact the existence of a prior conviction was an element of the charged offense that necessarily had to be found by the jury. App. 14-15, 18.

After considering the arguments of counsel, Judge Hill declined to preclude the solicitor from prosecuting Petitioner pursuant to S.C. Code Ann. § 16-3-655(A)(2) and declined to bar the jury from hearing the stipulation to which the parties agreed in regard to the existence of Petitioner's prior conviction. App. 23-24. In reaching that decision, Judge Hill found that the probative value of Petitioner's prior conviction was "essential" to prove a violation of the statute

and determined the situation in Petitioner's case was distinguishable from the situation in Old Chief v. United States, 519 U.S. 172 (1997), due to the fact the prior conviction necessary to prove first-degree criminal sexual conduct with a minor in South Carolina had to be for a specific type of offense related to the charged offense. App. 23-24. However, Judge Hill indicated he would provide a limiting instruction to the jury when the stipulation was introduced if one was desired. App. 24-25.

Subsequently, during trial, Victim testified about the abuse she suffered at the hands of Petitioner. App. 130-35. Specifically, Victim stated that Petitioner was physically abusive towards her, her mother, and her three sisters, and she reported that Petitioner began sexually abusing her when she was six years old. App. 130. In regard to the abuse, Victim testified that Petitioner painfully inserted his penis into her vagina and anus on numerous occasions, performed oral sex on her, and forced her to perform oral sex on him multiple times, and showed her "a bunch" of pornographic films depicting women engaged in sexual acts. App. 130-35. Furthermore, Victim stated that Petitioner threatened to kill her or hurt her mother if she did not engage in the sexual acts with him, and she indicated she did not reveal the abuse earlier because she was frightened of Petitioner. App. 136.

At the conclusion of Victim's testimony, the assistant solicitor moved to admit the stipulation regarding Petitioner's prior conviction and publish it to the jury. App. 165. In response, trial counsel stated: "[T]he Defense has no objection, Your Honor." App. 165-66. Thereafter, the stipulation was admitted into evidence without objection, and Judge Hill presented the following limiting instructions to the jury:

Now, this particular stipulation, before it is read to you, I want to instruct you on something else. And you'll, also, recall that I made what probably seemed a curious

statement earlier as well.² And that is that you can use some evidence for one purpose and one purpose only, and not for any other purpose. And this stipulation you're about to read can only be used by you, the jury, for a very limited purpose. And that purpose is simply on the issue of whether the State has met its burden of proof as to an element of the crime of criminal sexual conduct with a minor in the first degree. And you can give this stipulation whatever weight you decide to in that regard. You may not consider this stipulation for any other purpose. Your oath forbids you, for example, from using the evidence of this stipulation as proof of whether [Petitioner] committed the acts for which he's on trial here today, except on that issue of that element of the offense. So the law doesn't allow you to use the stipulation as proof of [Petitioner's] guilt for any charge that he's on trial for here today, except for deciding whether the State has met its burden of proof about a prior offense.

App. 166-67. Following those limiting instructions, Judge Hill presented the agreed-upon stipulation to the jurors, which instructed them that Petitioner “[had] been convicted of criminal sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and [was] currently on the South Carolina Sex Offender Registry.” App. 167. Judge Hill then again instructed the jurors they could only consider the stipulation that had just been presented to them for the limited purpose identified to them and not for any other purpose. App. 167.

As the trial continued, Lieutenant Miller testified about his investigation into the reported sexual abuse, and Wiley Garrett, a therapist assigned to work with Victim after she disclosed the sexual abuse, noted Victim was exhibiting symptoms of trauma subsequent to the abuse. App. 170-75, 184, 192-93. Additionally, Dr. Nancy Henderson, a board-certified child abuse pediatrician, testified about her physical examination of Victim after the abuse was revealed, indicated Victim

² Regarding that “curious statement,” Judge Hill had earlier stated to the jurors during his preliminary instructions: “Now, some evidence can be used for limited purposes. And I’ll tell you more about that later. But simply because something comes into evidence for one purpose doesn’t mean you can use it for other purposes. So bear that in mind as well. And remember, too, that this is an important trial for both sides, of course.” App. 109.

disclosed during the examination she was sexually abused between the ages of six and nine, and stated the examination results were normal. App. 205-06, 212, 215-18. However, Dr. Henderson noted normal examination results were extremely common in sexual abuse cases and did not mean that no sexual abuse had occurred due to the fact injuries to the genital area heal very rapidly. App. 217-18, 229. Furthermore, Mother, who had earlier pleaded guilty to unlawful conduct towards a child, testified for the prosecution, and indicated that Petitioner treated Victim very differently from her other children, noted Victim and her other children began to exhibit sexualized behavior after Petitioner moved into their home, and stated she awakened one time and saw Petitioner on the floor with his face at Victim's crotch. App. 230-31, 239-45, 272. Mother also candidly acknowledged that she instructed Victim to falsely accuse Victim's paternal uncle of sexually assaulting her, and she admitted Victim informed her that Petitioner was touching her genital area and that Mother did not do anything in response.³ App. 241, 245. Finally, following Mother's testimony, Austin testified about her meetings with Victim and confirmed that Victim disclosed she had been sexually abused by Petitioner. App. 286-88, 294, 306, 309.

Thereafter, at the conclusion of the evidentiary phase of trial, the parties rested their cases and presented their closing arguments to the jury, and Judge Hill instructed the jury on the applicable law. App. 319-72. As part of his jury instructions, Judge Hill advised the jurors that they must apply the law as he provided it to them and informed them they must follow all of his instruction. App. 360-61. Furthermore, in regard to the evidence of Petitioner's prior conviction, Judge Hill instructed the jury:

³ During her testimony, Mother also indicated Appellant wanted her to wear her hair in ponytails, pretend to be a little girl, and call him "Daddy" when they engaged in sexual intercourse. (R. p. 229).

You have heard evidence that [Petitioner] was convicted of a crime other than the one for which is now on trial. This testimony, if you conclude it is true, may only be considered by you for the limited purpose for which I told you that it could be. And that is whether the State has met its burden of proof as to an element of the crime for criminal sexual conduct in the first degree with a minor. You may not consider it for any other reason or any other purpose. You may not and must not consider this evidence of the commission of another offense as proof of [Petitioner's] guilt of the crime that we are charging – guilt of the crime that he is on trial for here today, other than to the extent I've told you that you could do so.

App. 365.

Subsequently, at the conclusion of trial, the jury convicted Petitioner as indicted. App. 375.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 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)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR 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 correctly found that Petitioner failed to prove that his defense attorney was constitutionally ineffective for not preserving for appellate review the issue of bifurcation because the professional norms prevailing at the time of Petitioner’s trial did not require that trial counsel request bifurcation and because trial counsel was not required to anticipate the change in law and procedure made by this Court in its opinion in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019).

Petitioner argues that trial counsel was constitutionally ineffective for not moving for the bifurcation of Petitioner’s trial so that the jury would not learn of the fact that Petitioner had previously been convicted of first-degree criminal sexual conduct with a minor because, had trial counsel done so the issue would have been preserved for appellate review, which would have resulted in a reversal of Petitioner’s convictions. Petitioner argues that trial counsel’s performance was deficient because trial counsel had a duty to object to the introduction of evidence of Petitioner’s prior conviction and that the duty to object to the introduction of “evidence is not new” Petitioner also argues that trial counsel’s alleged deficiency caused Petitioner to suffer prejudice because, if the issue had been preserved for appellate review, Petitioner’s convictions would have been reversed as was the defendant’s in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019).

The PCR court aptly summarized this Court’s holding in *Cross*. App. 497-99. In that case, this Court considered whether the trial court erred in denying Cross’s request that his trial be bifurcated when Cross was being tried for committing first-degree criminal sexual conduct with a minor in violation of South Carolina Code Section 16-3-655(A)(2) and had a prior conviction for first-degree criminal sexual conduct with a minor. One is guilty of first-degree criminal sexual conduct with a minor if he “engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or

adjudicated delinquent for an offense listed in Section 23-3-430(C)” S.C. Code Ann. § 16-3-655(A)(2). Cross moved for the bifurcation of his trial because, as he argued, he would be unfairly prejudiced if evidence of his prior conviction were introduced to prove the prior conviction element of Section 16-3-655(A)(2). Cross, at 470, 832 S.E.2d at 283-84. The trial court denied Cross’s motion to bifurcate, allowed the State to admit evidence of the prior conviction, and gave the jury a limiting instruction that it could not consider the prior conviction as evidence of Cross’s guilt of the offense for which he was being tried. Id. at 472, 832 S.E.2d at 285. This Court held that:

Evidence of [Cross’s] conviction for a specific offense under section 23-3-430(C) was admissible to prove the prior-conviction element of first-degree CSC with a minor. Therefore, the State must be allowed to introduce the conviction.

Id. at 484, 832 S.E.2d at 291. The proper question, as this Court explained, was not whether the evidence should have been admitted, but whether the **timing and method** of the admission of the evidence was proper. Id. at 484, 832 S.E.2d at 291 (emphasis added). This was because evidence of Cross’s prior conviction was not probative as to whether Cross had sexually abused the present victim, and because the danger of unfair prejudice from the admission of evidence the prior conviction at a phase of his trial concerning guilt was “exceedingly high” Id. at 477-78, 832 S.E.2d 287-88.

The PCR court correctly found that Petitioner failed to prove that trial counsel’s performance was deficient when trial counsel did not request that Petitioner’s trial be bifurcated because Petitioner did not prove that the prevailing professional norms at the time of trial would have required trial counsel to request the bifurcation. App. 505. This Court has instructed that a post-conviction relief court is to judge the performance of a defense attorney by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland v. Washington, 466 U.S. 668 (1984)). In order for a post-conviction

relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Id. (citations omitted). The "preeminent authority for all" courts when considering an applicant's claim of constitutional ineffectiveness requires that courts be highly deferential to counsel's performance because:

[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting Strickland).

Petitioner did not produce evidence that the prevailing professional norms at the time of his trial would have required a defense attorney to move to bifurcate the trial so as to require the jury to make findings as to all other elements of the statute before hearing evidence as to the prior conviction element. App. 505. That failure was predictable because, as this Court acknowledged in Cross, bifurcation in this context had not been required in previous cases and had not been seen commonly in court proceedings in this State or the federal courts. App. 503; Cross, at 478-79, 832 S.E.2d at 288. Petitioner argues that the duty of defense attorneys to "object to evidence is not new," but trial counsel's objection is not the issue; trial counsel did object thoroughly. The question is whether trial counsel was compelled by the norms of defense practice at the time of Petitioner's

trial to move for the bifurcation of Petitioner's trial in order to remove the possibility of any prejudice to Petitioner. Trial counsel did not request bifurcation because the concept was not one that would have been considered routine or standard practice by the bar. Petitioner gave the PCR court no reason to find otherwise.

The PCR court also correctly found that it would have been unreasonable to require trial counsel to have foreseen that this Court would hold in Cross that bifurcation was required. App. 505-06. The PCR court originally denied relief to Petitioner on the basis that the authorities existing at the time of Petitioner's trial did not authorize the bifurcation of a trial for the commission of first-degree criminal sexual conduct with a minor in violation of Section 16-3-655(A)(2). App. 501. The PCR court analyzed those authorities and concluded that Judge Hill afforded Petitioner all the protections allowed because of the prior conviction issue. App. 501-02. The South Carolina Court of Appeals came to the same conclusion when considering the issue on direct appeal. State v. Cross, Op. No. 2016-UP-257 (S.C. Ct. App. filed June 8, 2016) (per curiam) (citing Spencer v. Texas, 385 U.S. 554 (1967) (holding that the Fourteenth Amendment to the United States Constitution does not require that states bifurcate trials when evidence of prior crimes is admitted under a recidivist statute); State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000) (holding that evidence of another crime is admissible if it is used to establish the existence of a material fact of the element of the crime)).

This Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993). "An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction." Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d

686, 692 (2016) (quoting Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004)). As the PCR court noted, this Court’s opinion in Cross was issued approximately five-and-a-half years after Petitioner was tried. App. 505-06. This Court’s opinion in Cross indicates that even the members of this Court disagree about the provenance of the authority for a trial court to bifurcate a trial. Cross, at 484-85, 832 S.E.2d at 291-92 (Few, J., dissenting). At the very least, this Court acknowledged that the bifurcation now required by Cross has not heretofore been a typical part of practice in the courts of this State or the federal courts. Cross, at 478-79, 832 S.E.2d at 288 (citing Chubb v. State, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991) (“[A] bifurcated proceeding is not required in a non-capital case.”); State v. Bennett, 256 S.C. 234, 242, 182 S.E.2d 291, 295 (1971) (“[A bifurcated trial] is not required by either the common law, the statutory law, or the constitution of this State. It has now been settled by the United States Supreme Court that a bifurcated trial is not required by the United States Constitution.”); Spencer, 385 U.S. at 568 (“Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.”)). The PCR court was correct that, to have required as a matter of constitutionally effectiveness that trial counsel move for bifurcation more than five years before this Court issued its unprecedented opinion in Cross would have been to require trial counsel to be clairvoyant or a trailblazer in the courts’ adoption of a novel practice. App. 506.

CONCLUSION

Petitioner has failed to prove that trial counsel was constitutionally ineffective for not preserving for direct appellate review the issue of bifurcation. Petitioner has not proven that trial counsel would have been required by the prevailing professional norms at the time of Petitioner’s

trial to request bifurcation and has not proven that trial counsel was required to anticipate the change in law that this Court brought about with its opinion in Cross. The PCR court was correct to deny Petitioner's application for post-conviction relief and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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