

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Pickens County
The Honorable John C. Few, Trial Judge
Honorable R. Scott Sprouse, Post-Conviction Relief Judge

Lower Court Case No. 2013-CP-39-0836

JASON ERVIN BLACK,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

APPELLATE CASE NO. 2021-000525

NOTICE OF APPEAL

Jason Ervin-Black appeals the portions of the Honorable R. Scott Sprouse's Order granting post-conviction relief filed April 5, 2021, which denied certain claims by Jason Ervin-Black. The State filed a motion to reconsider which was denied on May 7, 2021. A copy of the court's April 5, 2021, Order is attached.

s/David Alexander
Appellate Defender

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ATTORNEY FOR RESPONDENT-PETITIONER

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Jason Ervin Black, #322628)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent)
_____)

ORDER GRANTING
POST-CONVICTION RELIEF

2013-CP-39-836

This matter comes before the Court by way of an application for post-conviction relief filed on July 2, 2013, by Jason Ervin Black (hereinafter referred to as "Applicant"). The State (hereinafter referred to as "Respondent") filed its return on December 17, 2019. Thereafter Applicant filed an amended/supplemental application for post-conviction relief on December 30, 2019, and a second amended/supplemental application for post-conviction relief on September 8, 2020.

An evidentiary hearing in this matter was held before me on March 4, 2021, with the parties appearing by WebEx due to the ongoing COVID 19 pandemic. Applicant appeared by WebEx from Kershaw Correctional Institution and was represented by his attorney, Don A. Thompson. Assistant Attorney General Lillian L. Meadows of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf. Respondent called John W. DeJong (Applicant's trial counsel) and Joseph L. Savitz, III (Applicant's appellate counsel) as witnesses.

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Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has proven that he is entitled to post-conviction relief and that his application for post-conviction relief should be granted.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. On March 13, 2007, the Pickens County Grand Jury indicted Applicant for Criminal Sexual Conduct with a Minor 1st degree (Indictment No. 2007-GS-39-675) and Lewd Act Upon a Child (Indictment No. 2007-GS-39-673). Applicant was represented by trial counsel, and Peter Them, assistant solicitor of the Thirteenth Circuit Solicitor's Office, prosecuted the case.

The matter proceeded to a jury trial on June 25-26, 2007, before the Honorable John C. Few. On June 26, 2007, the jury returned guilty verdicts to both charges. Judge Few sentenced Applicant to imprisonment for a term of 20 years on the charge of Criminal Sexual Conduct with a Minor 1st degree (Indictment No. 2007-GS-39-675) and a term of 15 years, concurrent, on the charge of Lewd Act Upon a Child (Indictment No. 2007-GS-39-673). Judge Few gave Applicant credit for his time served.

On July 2, 2007, trial counsel filed a timely notice of appeal. Chief Appellate Defender, Joseph L. Savitz, III, perfected Applicant's appeal before the South Carolina Court of Appeals by briefing the following issue:

"Whether the trial judge committed reversible error by allowing the State to impeach Black's corroborating witness with two Florida manslaughter convictions from 1987, as this evidence Violated Rules 404 and 609, SCRE."

On July 19, 2010, the Court of Appeals affirmed Applicant's conviction in an unpublished opinion. *State v. Black*, Op. No. 2010-UP-370 (S.C. Ct. App. Filed July 19, 2010).

The South Carolina Supreme Court granted Applicant's petition for writ of certiorari on November 3, 2011.¹

Following briefing and oral arguments, the Court affirmed Applicant's conviction in a published opinion issued filed October 3, 2012. *State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012). In that opinion, the Court found that the trial court had abused its discretion in admitting, for impeachment purposes, two remote manslaughter convictions from Florida in 1987, of Applicant's witness, Richard Bush. However, the Court held that Applicant did not appeal Bush's conviction at the same time for shooting/throwing a deadly missile, which was also used to impeach Bush. The Court held that since the admission of Bush's conviction for shooting/throwing a deadly missile was not appealed, "its admission is now the law of the case", and "any error in the admission of the two remote manslaughter convictions was harmless as the defense witness's character was similarly diminished by the admission of the unchallenged conviction for shooting/throwing a deadly missile". The case was remitted back to the Circuit Court on October 19, 2012. Applicant commenced this post-conviction relief action on July 2, 2013.

¹ Chief Appellate Defender Joseph L. Savitz, III, filed the petition for writ of certiorari on Applicant's behalf, however, Appellate Defender Breen R. Stevens began representing Applicant before the filing of the initial reply brief.

CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges ineffective assistance of trial counsel and appellate counsel, and seeks the reversal of his convictions and sentences, and that the charges be remanded for a new trial for the following reasons:

1. Counsel was constitutionally deficient during trial for failing to object, move for a mistrial or request curative instructions due to the improper conduct by the solicitor that consisted of "bolstering" the credibility of the alleged victim. Also, the solicitor "vouched" for the credibility of the alleged victim and called the defense witness a "liar" during his closing argument, which denied the Applicant due process of law.
2. Trial counsel was ineffective for failing to investigate or object to the use of a prior conviction, Indictment No. 97-GS-39-1437, to enhance the present charge to a first Degree offense where the Applicant did not have proper Notice of the prior offense, nor was there a factual basis for the plea to the prior conviction, which denied the Applicant due process of law.
3. Counsel failed to object to the State impeaching a defense Witness, Bush, with a remote conviction, a 1987 conviction in Florida for shooting/throwing a deadly missile.
4. If it is determined that trial counsel properly and timely objected to the admission of a 1987 conviction in Florida for shooting/throwing a deadly missile, thereby impeaching a defense witness, Bush, with a remote conviction, appellate counsel (Joseph L. Savita, III and/or Breen Richard Stevens) failed to raise the issue on appeal thereby failing to preserve the same.

Respondent's response to the above allegations of ineffective assistance of counsel is that such allegations are without merit.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety, including the transcript of Applicant's trial, the records of the Pickens County Clerk of Court regarding Applicant's convictions and sentences, the records from Applicant's appeals, Applicant's records from the South Carolina Department of Corrections, and the filings of the parties in this matter.

Set forth below are the relevant findings of facts and conclusions of law with regards to Applicant's claim of ineffective assistance of trial counsel and appellate counsel.

As to trial counsel.

Applicant testified that trial counsel was ineffective for failing to object or request a curative instruction to the solicitor "bolstering" and "vouching" for the credibility of the alleged victim. Applicant also testified that trial counsel was ineffective for calling a defense witness a "liar" during closing arguments.

Next Applicant testified that trial counsel was ineffective for failing to investigate or object to the use of a prior conviction to enhance the present charge.

Lastly, Applicant testified that trial counsel was ineffective for failing to object to the admission a remote conviction to impeach a defense witness, Bush. That conviction being a 1987 conviction from Florida for shooting/throwing a deadly missile.

Applicant's trial counsel, John W. DeJong, testified that he did not consider the statements of the solicitor to be "bolstering" or "vouching" for the credibility of the victim. He further testified that he expected the solicitor to argue the credibility of the defense

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witness, including calling him a "liar", as he opened the door during his closing argument to the solicitor making such an argument.

Mr. DeJong testified that he saw no issue with the use of the prior conviction of Applicant to enhance the present charge. The conviction was a matter of record.

As to failing to object to the admission of the remote conviction to impeach the defense witness, Bush, Mr. DeJong testified that he did object to the same.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 745 S.E.2d 97 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence – a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); *State v. Pendergrass*, 270 S.C. 1. 239 S.E.2d 750 (1977). This Court must apply the two-part test outlined in *Strickland* to determine whether counsel's conduct was so ineffective as to require reversal of the applicant's conviction and/or sentence. Pursuant to *Butler* the applicant must first show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant.

In the instance case, I find that Applicant has failed to prove that he is entitled to post-conviction relief based upon his claims that trial counsel was constitutionally ineffective.

I find Applicant's assertions that the solicitor "bolstered" or "vouched" for the credibility of the alleged victim to be without merit. While a prosecutor cannot vouch for

a witness' credibility {*State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001)}, I do not find, from the testimony presented and a careful review of the transcript of the trial, that the solicitor "bolstered" or "vouched" for the credibility of the victim in this matter.

As to the issue of the solicitor calling the defense witness a "liar" during closing argument, our Supreme Court has previously held it is improper to call a party a liar in closing argument. *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449 (1937). However, not all improper closing arguments require reversal. In criminal cases, "[a] new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Huggins*, 325 S.C. 103, 481 S.E. 2d 114 (1997). The propriety of the state's closing argument will be examined in light of the entire record. *State v. Nathari*, 303 S.C. 188, 399 S.E.2d 597 (Ct.App. 1990). Based on the testimony of Applicant's trial counsel that he believes he opened the door to the solicitor's comments, and after a careful review of the solicitor's closing argument from the trial transcript, I find that such comments did not infect the trial with unfairness which made the resulting conviction a denial of due process.

As to the issue of the use of the prior conviction of Applicant to enhance the present charge, I find this assertion to be without merit. The conviction was a matter of record and trial counsel had no reason to look behind the conviction to ascertain the facts related thereto. Had trial counsel done this, noting he could have found would have changed the fact that the conviction existed and could be used to enhance the Applicant's current charge.

Lastly, as to the issue of trial counsel failing to object to the admission of the remote conviction to impeach the defense witness, Bush, I find this assertion to be without merit. After reviewing the transcript, it is clear that trial counsel did raise this objection, as it was included in trial counsel's argument regarding the admissibility of the defense witness' prior convictions. Furthermore, the appellate courts found the issue to be preserved. I find that trial counsel adequately preserved this issue for appellate review.

I find that Applicant has failed to meet his burden of proof pertaining to his issues relating to trial counsel and that his petition regarding trial counsel should be, and hereby is, DENIED.

As to appellate counsel

As set forth hereinabove, Applicant's sole issue as to ineffective assistance of appellate counsel revolves around appellate counsel's failure to raise and argue on appeal the issue of impeaching the defense witness, Bush, with the 1987 Florida conviction of shooting/throwing a deadly missile.

As indicated above, the Supreme Court found that the trial court had abused its discretion in admitting, for impeachment purposes, two remote manslaughter convictions from Florida in 1987, of Applicant's witness, Bush. However, the Court held that Applicant did not appeal Bush's conviction at the same time for shooting/throwing a deadly missile, which was also used to impeach Bush. The Court held that since the admission of Bush's conviction for shooting/throwing a deadly missile was not appealed, "its admission is now the law of the case", and "any error in the admission of the two remote manslaughter convictions was harmless as the defense witness's character was

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similarly diminished by the admission of the unchallenged conviction for shooting/throwing a deadly missile”.

Applicant relied on the holding of the Supreme Court as evidence of appellate counsel's ineffective assistance.

In addition to the holding of the Supreme Court, one of Applicant's appellate counsel, Chief Appellate Defender, Joseph L. Savitz, III, was called to testify at this hearing by Respondent. He testified that he did not believe the issue as to shooting/throwing a deadly missile was preserved. He knew the manslaughter issue was preserved because it was argued extensively, but he did not believe the shooting/throwing a deadly missile charge was mentioned during the objection, only in passing during the manslaughter argument. Savitz further testified that he thinks the Court would have held that the issue was unpreserved if he had raised it, but that either way, he or trial counsel may have been ineffective. Savitz testified that he was "ineffective if it would have resulted in a reversal had it been raised."

A thorough review of the brief filed by appellate counsel corroborates the allegation that appellate counsel failed to raise the issue on appeal.

A criminal defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1985), *Bennett v. State*, 383 S.C. 303 (2009).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303 (2009) and *See Southerland v. State*, 337 S.C. 610, 524 S.E 2d 833 (1999). Therefore, it must be determined

whether appellate counsel's performance was deficient, and, if so, whether Applicant was prejudiced by appellate counsel's deficient performance. After carefully considering the record in this matter, particularly the opinion of the Supreme Court, I find that appellate counsel's performance was deficient, and that Applicant was prejudiced by appellate counsel's deficient performance.

In light of the above, I find that Applicant has met his burden of proof regarding ineffective assistance of appellate counsel and his petition should be granted. I find that the appropriate remedy in this matter is to grant Applicant a new trial. See *Ezell v. State*, 345 S.C. 312 (2001).

IT IS THEREFORE ORDERED that Applicant's application for post-conviction relief is hereby **GRANTED**, his convictions and sentences are vacated and set aside, and he is granted a new trial as to the charges set forth hereinabove which are the subject of this action.

IT IS FURTHER ORDERED that Applicant be remanded to the Pickens County Detention Center pending the outcome of these charges.

AND IT IS SO ORDERED.



R. Scott Sprouse
Judge, Thirteenth Judicial Circuit

Walhalla S.C.

3-29, 2021

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA