

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

S.C. Supreme Court

RANDALL SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213702

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective for failing to cross-examine the complaining witness about his motive to lie, in that petitioner's wife was blackmailing the minor because he was a homosexual?

STATEMENT

Petitioner was convicted of criminal sexual conduct with a minor in the second degree after a jury trial held before the Honorable D. Garrison Hill on November 7 – 9, 2005, in Greenville County. A twenty (20) year sentence was imposed. Thomas M. Creech, Jr., Esquire, was trial counsel. Christy L. Kednocker, Esquire, was the assistant solicitor. (App. p. 1 – p. 400).

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on December 9, 2008. State v. Smith, Op. No. 2008-UP-673. (App. p. 406 – p. 434). Petitioner filed a petition for writ of certiorari at the South Carolina Supreme Court that was denied on October 7, 2009. (App. p. 435 – p. 462).

Petitioner filed an application for post-conviction relief on September 27, 2010. (App. p. 464 – p. 490). Respondent filed a return dated February 4, 2011. (App. p. 491 – p. 495). An evidentiary hearing was held on October 31, 2012, before the Honorable R. Markley Dennis. Petitioner was present and was represented by Caroline Horlbeck, Esquire. Respondent was represented by Karen Ratigan, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 496 – p. 525).

On November 29, 2012, Judge Dennis issued an order denying and dismissing the application for post-conviction relief. (App. p. 538 – p. 546).

This petition follows.

ARGUMENT

Trial counsel was ineffective for failing to cross-examine the complaining witness about his motive to lie, in that petitioner's wife was blackmailing the minor because he was a homosexual.

Petitioner was accused of sexually assaulting the thirteen year-old minor. There was no medical evidence to corroborate the assault so the trial was basically a swearing match. Petitioner alleged in his application for post-conviction relief that trial counsel was ineffective in failing to attack the credibility of the minor. (App. p. 474 – p. 475). This issue was also raised in petitioner's amendment to his post-conviction relief application. (App. p. 487).

The issue of the minor being homosexual came about during pretrial because petitioner had written a letter on January 25, 2004, to his wife while incarcerated telling her that the minor had said he was worried about being a homosexual. The solicitor wanted this excluded under the rape shield statute. Trial counsel wanted it to be admitted into evidence. The issue was put on hold until the trial court could read the letter. (App. p. 10, line 11 – p. 16, line 4). During the trial, the issue came up again outside the presence of the jury and trial counsel abandoned the issue by agreeing to have the letter redacted on the subject of the minor's homosexuality. (App. p. 137, line 19 – p. 146, line 22).

Petitioner testified at the evidentiary hearing that he believed his wife was blackmailing the minor to make the allegations against him. (App. p. 504, line 16 – p. 505, line 12). Petitioner and his wife were having domestic problems. He was upset with trial counsel conceding away the opportunity to cross-examine the minor. While the rape shield statute, S.C. Code § 16-3-659.1, provides that evidence of specific instances of the victim's sexual conduct and opinion evidence of the victim's sexual conduct is not admissible, there are exceptions. In State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986), the Court held that a defendant was entitled to show that there was a

“vendetta” against him by the victim’s family in defense of accusations by the family’s minor child that the defendant had made sexual advances toward her. The Sixth Amendment to the United States Constitution gave the right of the defendant to present a defense in this respect. In State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989), the defense to assault to commit criminal sexual conduct in the first degree was that the charges were fabricated to silence the defendant about the complainant’s sexual conduct with her neighbor and to extort money from him. The court held this evidence was relevant to establish motive, bias, and prejudice on the part of the prosecution witness. In State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991), the defendant was prosecuted for first-degree criminal sexual conduct, kidnapping, and pointing a firearm. On appeal, the court held that the defendant in that case was prejudiced by not being permitted to enter evidence of the victim’s sexuality for the purpose of attacking his credibility. Finally, in State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000), the Court held that it was error to exclude evidence that the victim had previously been accused of sexual misconduct similar to the conduct the prosecution alleged against Grovenstein.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel’s ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel’s errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A “reasonable probability” is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733

(1997). In addition, “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

In petitioner’s case, credibility was a key issue. The court has previously held that “error which substantially damages the defendant’s credibility cannot be held harmless where such credibility is essential to his defense.” State v. Outlaw, 307 S.C. 197, 414 S.E.2d 147 (1992) quoting State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). Petitioner said at the evidentiary hearing that the fact that he had no way to present that the minor had a motive to lie was extremely damaging. This was even more so when the solicitor in her closing argument told the jury that much of the case boiled down to credibility and that the minor had no motive to lie.¹ (App. p. 506, line 17 – p. 507, line 3). But there was a motive to lie by the minor and defense counsel erroneously conceded that issue away. Defense counsel was ineffective in this regard.

¹ That portion of the solicitor’s closing argument can be found at App. p. 362, line 14 – p. 363, line 7.

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
R. Markley Dennis, Jr., Circuit Court Judge

RANDALL SMITH,

PETITIONER,

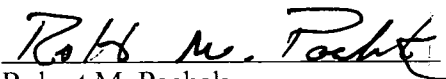
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

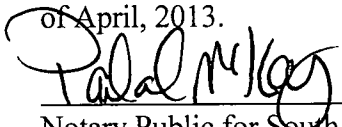
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of April, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of April, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.