RECEIVED
Mar 25 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Certiorari to Darlington County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002364

Larry James Tyler,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR REHEARING

On Wednesday, March 16, 2022, this Court reversed the PCR court's denial of post-conviction relief upon holding that Trial Counsel was constitutionally ineffective and prejudiced Tyler[1] by failing to seek a separate trial for Tyler's indictment for second-degree sexual exploitation from his remaining three indictments. This Court then remanded "to the court of general sessions for a new trial." Because this Court's holding is unclear as to the relief granted, because this Court overlooks a critical fact addressed in oral argument, and because this Court overlooks an implicit strategic consideration of Trial Counsel, Petitioner must respectfully petition for rehearing pursuant to Rules 221(a) and 240, SCACR.

---

[1] Footnote five of the Court's opinion observes that the PCR court noted Tyler was no longer confined in the South Carolina Department of Corrections. Respondent's Statement of the Case in Briefing asserted Tyler was confined in the South Carolina Department of Corrections. To clarify, upon information and belief, Tyler remains confined in the W. Glenn Campbell Detention Center as a result of ongoing proceedings in *In re: Care and Treatment of Larry James Tyler*, 2015-CP-16-00788, the status of which is presently contingent upon the disposition of Tyler's post-conviction relief appeal.

I. TYLER IS NOT ENTITLED TO RELIEF FROM ALL FOUR CONVICTIONS WHERE THE COURT'S ANALYSIS NECESSARILY CONCEDES THE STRENGTH OF THE EVIDENCE AS TO ONE CONVICTION AND DOES NOT CLEARLY SET FORTH PREJUDICE AS TO TWO CONVICTIONS.

The Court's opinion only finds *Strickland*[2] prejudice as to one to three of Tyler's convictions, not all four, and is not clear as to the relief it intends. After an extensive analysis of *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019), this Court held in part:

> The same danger arose here when the highly prejudicial photo supporting Tyler's sexual exploitation charge was admitted as evidence before the same jury considering his unrelated charges involving Child. It is difficult to imagine how such an image could *not* influence a jury, and the likelihood that the jury convicted Tyler on the three charges involving Child based on evidence inadmissible to those charges is not a danger we can ignore.

Tyler v. State, Op. No. 5902 (S.C. Ct. App. filed March 16, 2022) (Howard Adv. Sh. No. 10 at 58-59) (emphasis original). The Court proceeded to describe the evidence of Tyler's guilt for disseminating harmful material to a minor as "marginal" and concluded "it appears the jury's guilty verdict on the dissemination charge was likely based on the evidence admitted on the sexual exploitation charge." *Id.* at 59. The "Conclusion" section of the opinion reverses and remands for "a" new trial, not two. *Id.* The most sensible interpretation is that the Court intended to vacate only Tyler's dissemination, solicitation, and delinquency convictions. One narrowly technical interpretation is that the opinion has vacated only Tyler's dissemination conviction. Finally, another interpretation is that the Court has vacated all of Tyler's convictions.

This Court's opinion does not suggest any prejudice to Tyler's second-degree sexual exploitation of a minor conviction. To the contrary, the Court's opinion relies on the comparative strength and visceral impact of the evidence to support the exploitation conviction versus the "marginal" evidence regarding the dissemination count to find prejudice as to the

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

dissemination conviction. Thus, the Court's reasoning could not then be reasonably relied upon to conclude that the "marginal" dissemination count prejudiced the outcome of the strong exploitation count. Additionally, the Court does not *explicitly* address *Strickland* prejudice as to the solicitation or delinquency counts, though the Court very strongly implies as much through its analysis of whether the exploitation photo would have been admissible in a separate trial upon those indictments. *Tyler* at 57.

Assuming for the sake of argument that the Court's factual and legal analysis is inerrant, vacation of all counts does not follow. The correct relief, and presumably that intended by the Court, would be to affirm in part and leave intact the conviction for second-degree sexual exploitation of a minor, but reverse in part and vacate the other convictions. Such an outcome would be consistent with precedent in similar circumstances. *See State v. Smith*, 322 S.C. 107, 470 S.E.2d 364 (1996) (finding error in failing to sever counts of ABHAN and homicide by child abuse, vacating the homicide by child abuse conviction and leaving the ABHAN conviction intact).

Respondent respectfully requests this Court grant this Petition for Rehearing and, notwithstanding the relief sought in Sections II and III, below, amend the opinion to more clearly indicate that (1) Tyler's conviction for second-degree exploitation of a minor remains intact and (2) whether its *Strickland* prejudice reasoning as to the dissemination count is intended to also extend to the solicitation and delinquency counts.

II. THE COURT'S OPINION OVERLOOKS THE CRITICAL TESTIMONY OF FORENSIC INVESTIGATOR RUSS HARRELL WHICH PROVIDES FOR THE "CLOSE DIGITAL PROXIMITY" NEXUS BETWEEN THE SECOND-DEGREE SEXUAL EXPLOITATION OF A MINOR AND THE OTHER CHARGES.

The Court's opinion properly identified the necessary analysis of Tyler's conviction as heavily reliant on the particular facts of this case, but overlooked the most critical testimony relied upon by Respondent in oral arguments. After setting forth standards as articulated in *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002) and *State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002), the Court held:

> Here, the PCR court erred in relying on its finding that, "Trial Counsel noted that all charges stemmed from the same events and one search warrant." The record does not support this finding. While the exploitative photos from Tyler's computer were located during the execution of a search warrant obtained as a result of the draft texts and photos reported in connection with the cell phone, no other evidence supports the statement that the exploitation charge resulting from the computer photos "stemmed from the same events." Trial counsel recognized the distinction when specifically questioned about it.

Tyler at 52. The Court also concluded in a footnote that "[n]one of the photographs recovered from Tyler's computer and mail account depict Child or Sister, and the record contains no evidence that the two minor children saw these photos." *Id.* at 47, n.3.

However, at trial, Trial Counsel attempted to corner forensic investigator Russ Harrell regarding the transmitted character of the exploitative photograph and, in the process, elicited critical testimony referred to by Respondent in oral arguments:

> Q. All right. And can you tell how it was received? Was I received as – here is my point. Was it received, and I don't know much about this so. When I get an e-mail if it comes to me it just – it appears, right. If it's something that I'm not supposed to know about it comes on S.P.A.M. Can you tell if that one went to S.P.A.M. or went to his regular e-mail or do you have an opinion about that?
>
> A. At this point I don't believe – it was not in SPAM. Those were – a lot of these things were in folders. *He had folders with [Victim]'s name in his e-mail and various other folders that were separated by his different topics.*

Q. Okay. And in those folders were any of the other pictures or just Item Number 12?

A. I ran across – on State's Exhibit 13, Number Six was also replicated there to an e-mail.

Appx. 123-24 (emphasis added). In reliance upon this testimony, the undersigned argued to this Court that the "close digital proximity" of the child pornography to a folder labeled with the child's name as part of a "curated" collection of both explicit and non-explicit photos established the nexus necessary such that had Trial Counsel moved to sever at the original time of trial, denial of such a motion would not have amounted to an abuse of discretion by the trial judge. If denial of such a motion would not have amounted to an abuse of discretion, then Trial Counsel's failure to seek it cannot be deemed to have prejudiced Tyler. *See State v. Tallent*, 430 S.C. 438, 445, 845 S.E.2d 508, 512 (Ct. App. 2020) ("Decisions on severance and joinder are reviewed under a deferential standard. These rulings 'should not be disturbed unless an abuse of discretion is shown.'"); *cf. Early v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016) ("To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion."); *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (same prejudice standard as *Early*, but in context of failure to move for continuance). The opinion does not address this key detail on which Respondent relies.

The record is concededly inhibited by the absence of arguments and evidence which may have been otherwise advanced in a hearing on a motion to sever charges at the time of trial. For example, the photos in the folder bearing the child's name are not introduced as exhibits. If that absence is the basis of the Court's opinion, a clearer statement to that effect would be highly instructive to the State and lower courts. In any event, the testimony from Harrell identifying the folder in the e-mail where the exploitative photo was also found, in combination with the

testimony that Tyler regularly photographed the children, on top of the context that the evidence all derived from a single investigation, is sufficient to create the inferences argued by the State in closing, in briefing, and at oral arguments that the exploitative photo properly contextualizes his photography and other treatment of the children. *See* Brief of Respondent at 10-11.

Respondent respectfully requests this Court grant this Petition for Rehearing, withdraw its opinion, and affirm the denial of relief by the PCR court because the particular facts of this case provide that the charges were rightfully tried together, such that Trial Counsel was not constitutionally ineffective.

III. THE COURT'S OPINION OVERLOOKS TRIAL COUNSEL'S DESIRE TO PROCEED IN ONE TRIAL AFTER FINDING ADDITIONAL DAMAGING MATERIALS ON TYLER'S COMPUTER

The Court's opinion overlooks facts articulated by Trial Counsel at the PCR hearing which he implicitly considered in proceeding on all counts in a single trial. The Court, in considering whether a strategic reason existed to justify Trial Counsel's decision making, held:

> At the PCR hearing, trial counsel testified he did not see any reason to seek separate trials, and no evidence supports that his analysis was related to a valid strategic decision. *Contra Smith*, 386 S.C. at 567, 689 S.E.2d at 632 ("[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." (emphasis added)). Trial counsel acknowledged the unrelated photo of a young girl engaged in a sex act "was an awful picture" but did not explain how he thought he could minimize its impact or why this was a reasonable tactic.

Tyler at 57. Respectfully, the Court misapprehends the presumption of effective assistance in *Strickland* analysis and consequently overlooks facts articulated by Trial Counsel as a basis for his decision making.

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir.

2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

At the PCR hearing, Trial Counsel explained how his independently retained computer expert found more damaging materials on Tyler's computer. Neither Tyler nor Trial Counsel wanted those materials to come out. The looming threat of worse evidence coming into greater light was a heavy strategic consideration.

Trial Counsel admittedly never states in plain text "my strategic reason for not seeking to sever the trials is that I wanted to reduce the State's opportunity to identify and prosecute upon the worse materials my expert found," but Trial Counsel does not have to. Articulation is not a condition precedent to a finding against deficiency, but rather it is merely a potential shortcut to facilitate prompt disposition of claims for relief. If trial counsel had to articulate a strategy in order to avoid a finding of deficiency, the State would have considerable difficulty defending convictions where the original trial counsel were deceased, unavailable, or even merely uncooperative or forgetful.[3] Consequently, whether a strategic reason existed for a decision requires something less than an explicit, syntactically ironclad "because-then" statement, and something more than creative, post-hoc justification generated by the State. The analysis is akin to listening to jazz, as Miles Davis describes it: the Court must listen for the notes not played.

The Court in oral arguments skeptically received this "avoid much more, and much worse" argument as a basis for a strategic decision, questioning why the State couldn't just indict and prosecute the additional materials given the State's awareness of them. *See* Appx. 23, ll. 21-24. If Trial Counsel secured an acquittal after a single trial, whether partial or total, then the State would have faced allegations of vindictive prosecution had it proceeded with fresh, new

[3] Poor memory is a particularly common problem where, as was the case here, an overworked public defender's strategic and tactical thinking cannot be put on the record until many years after the original trial proceeding.

indictments. *See State v. Odom*, 412 S.C. 253, 264, 772 S.E.2d 149, 154 (2015) (A presumption of vindictiveness may arise if a criminal defendant establishes that circumstances surrounding the initiation of the prosecution posed a realistic likelihood of vindictiveness). Additionally, the record is silent as to whether the more damaging materials were properly preserved and available for subsequent prosecution, which was Tyler's burden to show because the law strongly presumes Trial Counsel's reasoning to be valid.

Respondent respectfully requests this Court grant this Petition for Rehearing, withdraw its opinion, and affirm the denial of relief by the PCR court because the particular facts of this case provide that Trial Counsel based his decisions on valid considerations and thus was not constitutionally ineffective.

CONCLUSION

For all of the foregoing reasons, the State requests the Court grant the petition for rehearing, and grant either the relief requested in Section I, above, or the relief requested in Sections II and III, above.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803.734.3737

25 March, 2022

RECEIVED
Mar 25 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Certiorari to Darlington County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002364

LARRY JAMES TYLER, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Victor R Seeger, Esquire
vseeger@sccid.sc.gov

This 25th day of March 2022

Johnny Ellis James, Jr.
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia. SC 29211

ALAN WILSON
ATTORNEY GENERAL

March 25, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court — SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(via e-filing only - ctappfilings@sccourts.org)

RE: Larry James Tyler v. State of South Carolina
Appellate Case No.: 2016-002364

Dear Ms. Kitchings:

Enclosed please find the Petition for Rehearing, in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this motion today.

Sincerely,

Johnny Ellis James, Jr.
Assistant Attorney General

JEJ/geh
Enclosures

cc: Victor R Seeger, Esquire (via email)