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United States Court of Appeals
Tenth Circuit

May 22, 2015

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT CLAUDE MCCORMICK,

Petitioner - Appellant,

v.

DAVID PARKER, Warden,

Respondent - Appellee.

No. 14-7095
(D.C. No. 6:10-CV-00117-JHP-KEW)
(E.D. Okla.)

ORDER GRANTING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS**, Circuit Judge.

In 2007, a jury convicted Robert Claude McCormick of child sexual abuse and child abuse in violation of 10 OKLA. STAT. tit. 10 §§ 7115 and 7115(E) (2001) (current version at OKLA. STAT. tit. 21 § 843.5 (2014)). A key witness at trial was Carolyn Ridling, who had examined M.K., the victim, during the prosecution's investigation. Ridling purported to be a licensed Sexual Assault Nurse Examiner ("SANE") nurse, and testified that M.K. had sustained physical injuries that evinced sexual assault. But McCormick presents evidence that Ridling provided false testimony about the status of her certifications. Based on

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

this evidence, McCormick seeks habeas relief on the issues of the prosecution's withholding favorable evidence under *Brady v. Maryland* and on ineffective assistance of trial counsel.

The district court denied relief on McCormick's *Brady* and ineffective assistance-of-counsel claims. It also denied a certificate of appealability ("COA") for both claims. McCormick now petitions this court to grant him a COA on both claims. Based on our review, we grant a certificate for both his *Brady* claim and ineffective assistance of counsel claim.

I. FACTS AND PROCEDURAL HISTORY

At trial, M.K. testified that at the age of seven, McCormick started dating her mother and moved in with her family. **R. Vol. I at 683.** He brought a motor home onto the property, and, when M.K. was eight years old, he had her sleep in the motor home with him. **R. Vol. I at 684–85.** She said that she helped him cook methamphetamine in the motor home. **R. Vol. I at 687–88.** She also testified that McCormick then began sexually assaulting her. **R. Vol. I at 695–700.**

In 2001, when M.K. was 11, she first reported to a DHS worker at her school that McCormick was sexually assaulting her. **R. Vol. II at 916, 922.** She made similar reports to another DHS worker in 2002. **R. Vol. II at 933, 939–41.** The accusations were brought to the attention of District Attorney Investigator Mike Overton, who interviewed M.K. in 2002. **R. Vol. II at 805.** During the interview, M.K. accused McCormick of numerous sexual acts. **R. Vol. II at 810–**

12. In response, M.K. was taken to Texoma Medical Center in Dennison, Texas to be examined. **R. Vol. II at 951.** Ridling performed the sexual-assault examination. **R. Vol. II at 950–51.**

As part of preparing for trial, the Assistant District Attorney endorsed Ridling as one of the prosecution's witnesses on the Information filed against McCormick. **R. Vol. II at 15.** McCormick's counsel filed a pre-motion for discovery, specifically requesting all "evidentiary material which is the basis for an opinion of a state's expert witness." **R. Vol. II at 66.** In response, the government provided McCormick's counsel no information regarding Ridling's license or credentials, and he did not inquire further.

During *voir dire*, the prosecutor asked the prospective jurors whether to convict they would need additional evidence beyond M.K.'s testimony. **R. Vol. II at 560.** Two jurors responded affirmatively. **R. Vol. II at 560–62.** The prosecution presented Ridling as a witness who could corroborate M.K.'s report of sexual assault. During opening statements, the prosecutor stated that Ridling was "probably the most important corroborating witness" it was presenting. **R. Vol. II at 613.** The prosecutor further testified that Ridling "is a registered nurse . . . and she is specifically trained to do sexual assaults examinations." **R. Vol. II at 613.**

Ridling testified that she was a certified Sexual Assault Nurse Examiner ("SANE nurse"). **R. Vol. II at 947–48.** She told the jury that "I'm certified by the

Attorney General's Office in the State of Texas" to perform sexual assault examinations. **R. Vol. II at 948–49.** She explained she had undergone extensive training, continuing education, and annual peer review to maintain her certification. **R. Vol. II at 949–50, 971.** She also said that she was allowed to make diagnoses without the presence of, or consultation with, any medical doctors or other medical personnel beyond herself, in accordance with the guidelines of the American Nurses Association and the Forensic Nurses Association. **R. Vol. II at 835.** She then testified that in her professional opinion, M.K. had genital tears and scarring, which can only come from "some kind of penetration." **R. Vol. II at 965.** Other than M.K.'s own account of what happened, we understand that Ridling provided the only other direct evidence that M.K. had been sexually assaulted.[1]

The jury found McCormick guilty of child sexual abuse and child assault, and sentenced him to life imprisonment on both counts. **R. Vol. II at 191–92.** The court ran the sentences consecutively. **R. Vol. II at 215–16.** On direct appeal to the Oklahoma Criminal Court of Appeals ("OCCA"), McCormick's appellate counsel raised a single issue—whether the two counts violated the Double Jeopardy Clause. **R. Vol. I at 465–74.** The OCCA denied relief, but it modified the sentences to run concurrently. **R. Vol. I at 489–92.**

[1] Direct evidence included, in addition to the testimony of M.K. and Ridling, photographs taken by Ridling during her examination. **R. Vol. I at 432.** The photographs show that M.K. had two tears in her hymen and one on her anus. ***Id.*** **at 437.** As we understand it now, the photographs were taken about six months after M.K. was near McCormick. ***Id.***

In 2009, appearing *pro se*, McCormick filed an application for post-conviction relief in the district court of Bryan County, Oklahoma. **R. Vol. I at 499.** The court denied relief. **R. Vol. I at 494–95.** McCormick appealed, and the OCCA affirmed the court's denial of his application. **R. Vol. I at 609–11.** Still *pro se*, in 2010 McCormick filed his federal habeas petition in the United States District Court for the Western District of Oklahoma. **R. Vol. I at 8–34.** He submitted documents evincing Ridling's false testimony regarding her license, certifications and training. **R. Vol. I at 277–301.** These included an affidavit from the program manager for the Office of the Attorney General of Texas SANE/SART program attesting that Ridling's certification as a SANE nurse had lapsed in 2004; an affidavit from the Oklahoma Board of Nursing asserting that Ridling's license had lapsed in 2004; a letter from the Grayson County District Attorney to all Grayson County criminal defense attorneys advising them of Ridling's false testimony; and an order from the Texas Board of Nursing advising that Ridling had misrepresented herself as a certified SANE nurse in 2007. ***Id.*** The case was then transferred to the Eastern District of Oklahoma. **R. Vol. I at 302–03.** The district court granted habeas relief on McCormick's double jeopardy claim, and found all of his other claims moot in light of that ruling. **R. Vol. I at 940–50.**

McCormick appealed. He obtained a COA from a different panel of this court on his *Brady* and ineffective-assistance-of-counsel claims. **Appellant's Br.,**

Att. C, at 3. After reviewing the merits, this court reversed the district court's mootness determination and remanded for a ruling on the merits. *McCormick v. Parker*, 571 F. App'x 683, 689 (10th Cir. 2014) (unpublished). On remand, the district court directed the parties to submit briefs, but did not take additional evidence or hold any hearings on the matter. The court denied relief on both the *Brady* claim and the ineffective-assistance-of-counsel claim. **R. Vol. I at 1022–40.** McCormick sought a COA, and the district court denied it without explaining its bases for denial. **R. Vol. I at 1044, 1075.** This appeal followed.

II. STANDARD FOR CERTIFICATE OF APPEALABILITY

To appeal the district court's denial of his federal habeas petition, McCormick must first obtain a COA. 28 U.S.C. § 2253(c)(1)(A). To do so, he need make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This requires that "[t]he petitioner . . . demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a habeas applicant seeks appellate review of a dismissal of his petition, "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claim." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

III. *BRADY* CLAIM

McCormick first requests a COA on his *Brady* claim. He argues that Ridling's false trial testimony on the status of her qualifications, credentials, and training violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87; *see also Browning v. Trammell*, 717 F.3d 1092, 1094 (10th Cir. 2013) (*Brady* "held that an individual's constitutional right to a fair trial obligates the prosecution in a criminal case to turn over evidence to the defense in certain circumstances.").

To prevail on a *Brady* claim, the accused must make several showings: (1) that "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) that "prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Specifically, "[u]nder *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). Evidence is material "within the meaning of *Brady* when there is a reasonable

probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Id.* (alterations in original) (citations omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

For McCormick to prevail on his *Brady* claim, he must show: (1) that the evidence regarding Ridling's certifications status was suppressed; (2) that Ridling was a member of the prosecution team or that her knowledge should be imputed to the prosecutor; (3) that the evidence regarding Ridling's lapsed status of credentials was favorable to McCormick; and (4) that the evidence regarding Ridling's lapsed credentials was material in McCormick's trial.

We dispense with the first and third elements quickly. Unquestionably, Ridling failed to disclose her lapsed credentials. **R. Vol. I at 277–88.** The government concedes as much. **R. Vol. I at 434 (admitting Ridling "was not certified SANE by the time of trial").** That her credentials had lapsed is favorable to McCormick. "[I]t is worth noting that 'because impeachment is integral to a defendant's constitutional right to cross-examination, there exists no pat distinction between impeachment and exculpatory evidence under *Brady*.'" *Smith v. Sec'y of N.M. Dep't of Corrs.*, 50 F.3d 801, 825 (10th Cir. 1995) (quoting *Ballinger v. Kerby*, 3 F.3d 1371, 1376 (10th Cir. 1993)). "Where a

witness' credibility is material to the question of guilt, the disclosure obligation includes impeaching information." *United States v. Fleming*, 19 F.3d 1325, 1330 (10th Cir. 1994) (citing *United States v. Buchanan*, 891 F.2d 1436, 1443 (10th Cir. 1989)). This leaves us to determine whether reasonable jurists could regard the second and fourth elements as debatable. We think that they could.

The district court denied relief on McCormick's *Brady* claim because Ridling was not employed by the State of Oklahoma at the time of trial and so was not under the prosecution's authority at that time. **R. Vol. I at 1030.** But we think that limited inquiry is insufficient. For a *Brady* claim, the "'prosecution' . . . encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." *Smith*, 50 F.3d at 824 (citations omitted). "[I]nvestigative officers are part of the prosecution, [and so] the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure." *Id.* (quoting *Buchanan*, 891 F.2d at 1442).

We think it is important that this court has previously determined that "reasonable jurists could debate whether Ms. Ridling's knowledge of her certification status could be imputed to the prosecution." **Appellant's Br., Att. C., at 7;** Order Granting a Certificate of Appealability in Part and Denying a Certificate of Appealability in Part, No. 13-7016 (10th Cir. Aug. 12, 2013)

(unpublished). Since that decision, the parties have presented no additional evidence or arguments that lead us to question our earlier decision. Moreover, other jurisdictions have recognized SANE nurses as members of the prosecutorial team. *See, e.g.*, *People v. Uribe*, 162 Cal. App. 4th 1457, 1481 (Cal. App. 2008) (citing *Medina v. State*, 143 P.3d 471 (Nev. 2006)); *State v. Farris*, 656 S.E.2d 121, 126 (W. Va. 2007) ("the knowledge which [the forensic psychologist] obtained with respect to her examination of Barbara R. would be imputed to the West Virginia prosecuting authorities."). Based on our review of the record, as we have previously said, jurists could debate whether Ridling was part of the prosecution as the only investigator in the case. ***See*** **Appellant's Br., Att. C;** Order Granting a Certificate of Appealability in Part and Denying a Certificate of Appealability in Part, No. 13-7016 (10th Cir. Aug. 12, 2013) (unpublished).

The final question is whether the lapse of Ridling's certification, and her false testimony about it, is material. To demonstrate materiality, the accused must show "only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Cain*, 132 S. Ct. at 630 (alteration in original) (quoting *Kyles*, 514 U.S. at 434). Evidence can be considered "material" even when it relates solely to impeachment. *Smith*, 50 F.3d at 825.

Again, we agree with the earlier panel of this court that "[i]n considering the evidence that Ms. Ridling had lied, a reasonable jurist could regard

materiality as a debatable issue." **Appellant's Br., Att. C, at 7;** Order Granting a Certificate of Appealability in Part and Denying a Certificate of Appealability in Part, No. 13-7016 (10th Cir. Aug. 12, 2013) (unpublished). First and foremost, any time a witness falsely testifies on the stand she undermines her own credibility. But Ridling's false statements were even more significant in the context of this case. Here, two jury members stated during *vior dire* that they would require more than the testimony of M.K. to convict McCormick of accusations of child sexual abuse. **R. Vol. II at 560–62.** The prosecutor declared that Ridling was "probably the most important corroborating witness" in the case. **R. Vol. II at 613.** We think at least one juror might have given Ridling's testimony less weight if he or she had learned that her credentials had lapsed and that she had not been truthful about the lapse.

In a similar case,[2] the Texas Court of Appeals concluded that Ridling's testimony impacted the jury's verdict, requiring reversal:

> Here, the jury was required to determine whether to believe [the girl's] testimony or that of appellant's. Ridling, as the State's expert, was the State's only witness whose testimony was based, at least in part, on independent facts rather than on [the girl's] version of events. Her testimony regarding the physical findings of [the girl's] examination corroborated [her] allegations. As such, [Ridling's] testimony was critical to establishing the State's case. And, because Ridling's false testimony involved her credentials as an expert, it undoubtedly gave greater weight to her opinion.

[2] There too, Ridling had examined a girl and testified that the girl had scarring of her hymen, which indicated penetration. Ridling also testified that she was properly credentialed as a SANE nurse. *Nguyen v. State*, 05-07-01775-CR, 2009 WL 755412, *1 (Tex. App. Mar. 24, 2009).

Nguyen v. State, 05-07-01775-CR, 2009 WL 755412, *3 (Tex. App. Mar. 24, 2009). We acknowledge McCormick's argument that "if the jury had known of Ms. Ridling's false testimony about her qualifications, training, and methodologies, it might not have believed her at all."[3] **Appellant's Br. at 39.**

We therefore direct the Clerk to order McCormick's counsel to file a brief addressing the merits of the *Brady* claim. We will then afford the government an opportunity to file a response brief.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

McCormick next asks that we grant him a COA on his ineffective assistance of trial counsel claim. To prevail on an ineffective-assistance-of-counsel claim, McCormick must show that (1) his counsel's representation "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

McCormick contends that his trial counsel was ineffective in failing to investigate Ridling's lapsed certifications and failing to challenge her false testimony with the impeaching information a proper investigation would have revealed. **Appellant's Br. at 54.** "[C]ounsel has a duty to make reasonable

[3] We note that in its merits briefing, the government may present evidence beyond M.K.'s and Ridling's testimony that corroborates the child sexual abuse conviction.

investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . . ." *Strickland*, 466 U.S. at 691. McCormick submitted a letter by a Texas attorney who states that "[a] proper investigation by [McCormick's] attorney would have revealed" that Ridling provided misleading testimony about her lapsed credentials. **R. Vol. I at 381.**

In a similar claim, the Texas Court of Appeals concluded that:

> [Lollis] contends that his trial counsel rendered ineffective assistance because he did not investigate the credentials of [Ridling] claiming to be a certified sexual assault nurse examiner and did not discover that the certification had lapsed, despite her testimony to the contrary.
>
> [Lollis] has alleged facts that, if true, might entitle to him relief.

Ex parte Lollis, WR-71462-01, 2009 WL 696230, *1 (Tex. Crim. App. Mar. 18, 2009) (finding that proof of Lollis's allegation that his trial counsel was ineffective for failing to investigate the status of Ridling's certification might have justified habeas relief); *see also Ottley v. State*, 752 S.E.2d 92, *22 (Ga. App. 2013) (finding counsel provided ineffective assistance for failure to investigate nurse's credentials when she was testifying to physical examination given to alleged sexual-assault victim).

Here, we agree with the earlier panel that "*Lollis* shows that jurists might reasonably find attorneys ineffective if they failed to investigate Nurse Ridling's

credentials and, in doing so, gave up an opportunity to impeach her with an admission that she had lied about the status of her certification." **Appellant's Br., Att. C, at 10**; Order Granting a Certificate of Appealability in Part and Denying a Certificate of Appealability in Part, No. 13-7016, at 10 (Aug. 12, 2013).

While we conclude that a reasonable jurist could debate whether McCormick's counsel was ineffective, we must further consider the issue of whether this claim is procedurally barred because of McCormick's failure to raise the issue on direct appeal. When a habeas petitioner alleges that his trial counsel was ineffective, we apply the procedural bar only if the petitioner had a different attorney on appeal and the habeas claim can be resolved on the trial record alone. *English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998). McCormick did have different lawyers at trial and on appeal. **R. Vol. II at 64 (trial counsel), 213 (appellate counsel).**

But it is unclear whether the issue can be resolved on the trial record alone because the record does not reveal what McCormick's counsel did to investigate Ridling's background and credentials. Nor does the record provide guidance about the professional norms associated with investigating witnesses such as Ridling. Thus, we agree with the earlier panel of this court that the possibility of a procedural bar does not preclude a COA on McCormick's claim of ineffective-assistance-of-counsel.

Therefore, we will grant McCormick a COA on this claim. We direct the Clerk to order McCormick's counsel to brief the merits of the ineffective assistance claim. The government will then be afforded time to address the issue in a response brief.

V. CONCLUSION

In conclusion, we grant McCormick's application for a certificate of appealability on both his *Brady* claim and his ineffective-assistance-of-counsel claim. A schedule for the briefing will be established in a separate order.

ENTERED FOR THE COURT

Gregory A. Phillips
Circuit Judge