

FILED
BY: *LDG*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

39516-9

IN PERSONAL RESTRAINT OF:
GERMAINE D. CARTER

No.
PERSONAL RESTRAINT PETITION
RAP 16.4 et seq.,.

I. STATUS OF PETITIONER

COMES NOW the petitioner, Germaine Carter, pro se, seeking relief by way of personal restraint petition. Petitioner is currently restrained within the Washington Department of Corrections (WDOC), at Stafford Creek Corrections Center (SCCC).

Petitioner's detention is by way of conviction of four counts of first degree rape of a child. RCW 9A.44.073. These crimes were submitted to a jury in Pierce County. The guilty verdict came about on May 22, 2008. Cause # 07-1-02885-6.

Petitioner is currently on direct appeal and this petition is timely. RCW 10.73.90.

II. RELEVANT FACTS

A.C. is the troubled daughter of the petitioner. She lived with petitioner from 2003 until September of 2004. 3RP 279; 3RP 281.

Almost three years after ~~the~~ ^{petitioner} ~~petitioner~~ ^{of the} petitioners PRP of Carter, page 1

**PETITIONER MAY FILE THE
PETITION WITHOUT PAYMENT OF
A FILING FEE**

[Signature]
COURT CLERK 8/2/09

GDC

2. Was trial counsel effective?

IV. ARGUMENT

1. Certain witnesses vouched for the victims credibility.

A witness may not vouch for the credibility of a victim or another witness. Washington law is very specific as to this. It "is clear that testimony containing opinions on a defendant's guilt are unconstitutional. No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct or inference. Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make independent evaluations of the facts." State v. Wilber, 55 Wn.App. 294, 297, 777 P.2d 36 (1989)(quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). The case law also clearly shows that witness opinion as to another witness's credibility is improper. "[N]o witness may give an opinion on another witness' credibility. State v. Carlson, 80 Wn.App. 116, 123, 906 P.2d 979 (1995). Such violations are in conflict with the Fifth, Sixth and Fourteenth Amendment to the United States Constitution.

As a threshold determination, this court will, undoubtedly, have to deal with the question of if this issue is properly before the court. RAP 2.5. Arguments concerning a witness vouching for the credibility of certain evidence has changed in the last several years--as to how RAP 2.5 should be interpreted (Objection... manifest). Most recently, the Washington Supreme Court reversed the Court of Appeals decision in State v.

then the purpose and intent of giving the lower court a chance has been adhered to.

Assuming *arguendo*, Carter argues later in this brief that counsel was ineffective for not objecting to the witness' opinions on the credibility of the victim.

a. The Child Forensic Interviewer

Patricia Mahaulu-Stephens was the child forensic interviewer who interviewed A.C. and testified at Carter's trial. 5RP 242-271.

On direct examination, the following question was asked of Mahaulu-Stephens:

"Based on your interview with [AC] and what you talked about with her grandma before you started and any other background information that you had going into this, were you aware of any motive that [AC] had lied about what occurred." 5RP 253.

Mahaulu-Stephens was very emphatic with what her particular opinion was of if A.C. had lied:

"No, No." 5RP 253.

This court should examine the original question very closely. Not only does it ask the witness her opinion of evidence admitted before the court, but it request her opinion of "any other background information that [she] had going into this." This question implies that there was additional evidence beyond her interview with A.C. and her grandma.

Even without reading anything into the "any other" language, the question obviously vouched for the credibility of the

A.C. "is a truthful child?" 6-B RP 399. Root answered the question in the affirmative. The follow up question could have possibly cured any error: "Have there been times when she has not told the truth?" Wherein, Root once again answered in the affirmative. However, the last question in the sequence amplified the error ten-fold: "Have there been times when she's not told the truth that was important?" Root answered "not that I recall."

Obviously this situation would be considered "important" by anyone's standard. Therefore this would be a direct opinion from Root on the credibility of her niece.

The analysis above (section "a") is the same that can be applied to Root's testimony.

The only analysis that would remain is that of harmless error. Both the forensic investigator and Root's testimony were very important to Carter's conviction.

"A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "We employ the 'overwhelming untainted evidence' test to determine if the error was harmless." *Id* at 426. "We examine whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt." *Id* at 426.

In this case, no physical evidence was present. At best, the evidence is that A.C. repeated the same factual (surface) recitation to her grandma, the forensic investigator, and the PRP of Carter, page 7

3RP 282. So serious, in fact, that she was taken to the hospital on two separate occasions. 5RP 407. She had open sores, mostly on her legs, with some lesions on her buttocks and abdomen. 4RP 378. "She was oozing and weeping... and it was hard for her to walk." 6RP 380.

A.C. did not remember much about her infection or treatment. 2RP 171. She did not even remember if she had been given medicine. 2RP 173. She even insinuated that she did not remember who had put the cream on her. 2RP 174.

The admissibility of the doctor's reports from A.C.'s two hospital reports was a hot topic during several points in the trial. At one point, petitioner's trial counsel stated he did not want to have to call in the two doctors, "[b]ut if that's where we need to go, then that's certainly where I'll go." 6RP 387.

The crux of the defense involved the child being confused between a sexual assault and that of a medical treatment. This defense, necessarily, involved showing the painfulness of the treatment, and where the infection had been on her body at the time of the hospital visits. Moreover, the record is barren of any explanation of what Impetigo is. This court should take judicial notice that Impetigo is not a common medical condition.

If trial counsel chose not to interview or call the examining doctors from the two hospital visits, he should have at least provided some sort of medical witness to explain what Impetigo is--and how severe it can get. (without such testimony, this defense was actually not a defense at all.)

also provided a declaration. See Ex. 2, Declaration of Melanie Warner ("Melanie Dec.").

Such testimony would not have been cumulative, and no tactical reason exist for counsel not to have called this witness. The failure to call such a witness is unreasonable, and the result is obvious prejudice. The likelihood of a different result is highly probable.

At the least, an evidentiary or reference hearing is necessary.

2. Petitioner also requested trial counsel to call his cousin, Bryce McMahon. McMahon's testimony would have been as stated in his Declaration included with this petition. Ex. 3 Declaration of Bryce McMahon ("McMahon Dec.").

McMahon lived in petitioner's home during the period in question. He, in fact, slept with his girlfriend on the living room couch. McMahon Dec. at Ex. 3. Such fact disputes the testimony that Allyssa sometimes slept downstairs on the couch.

McMahon, also, would have testified that he never saw any inappropriate activity between petitioner and A.C. McMahon Dec. at Ex. 3.

Most important, for purposes of this argument, is that McMahon did contact Jerry Crow, the private investigator for petitioner's counsel, and voiced that he wanted to testify to the facts contained in the attached Declaration. Evenmore, McMahon traveled from Texas to make himself available at petitioner's trial. McMahon Dec. at EX. 3.

Exhibit A

Exhibit B

Exhibit C

10. Upon my arrival, I was told there would be no reason for me to testify.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

C/22/09

DATE

Bryce McMahon

Bryce McMahon

place:

_____ have any savings accounts or checking accounts. If so,

the amount in all accounts is \$ 192.40.

_____ own stocks, bonds, or notes. If so, their total value is \$ _____.

8. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item of property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
<u>Ø</u>	<u>Ø</u>
_____	_____
_____	_____
_____	_____

9. I am am not _____ married. If I am married my wife or husband's name and address is

N/A

10. All of the persons who need me to support them are listed here.

Name and Address	Relationship	Age
<u>Ø</u>		

11. All the bills I owe are listed here.

Name of creditor Address Amount

You owe money to

Legal Financial Obligations

FVOLZ

STAFFORD CREEK CORRECTIONS CENTER

OTRTASTB

TRUST ACCOUNT STATEMENT

6.04.4.0.1.1

DOC# 0000776240 Name: CARTER, GERMAINE D
LOCATION: S01-317-H4111U

BKG# 303118

Account Balance Today (05/01/2009) Current : 146.93
Hold :
Total : 146.93

Account Balance as of 04/30/2009 146.93

04/01/2009 04/30/2009

SUB ACCOUNT	START BALANCE	END BALANCE
SPENDABLE BAL	18.86	91.89
SAVINGS BALANCE	18.75	50.78
WORK RELEASE SAVINGS	0.00	0.00
EDUCATION ACCOUNT	0.00	0.00
MEDICAL ACCOUNT	0.00	0.00
POSTAGE ACCOUNT	6.10	4.26
COMM SERV REV FUND ACCOUNT	0.00	0.00

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.
CVCS	CRIME VICTIM COMPENSATION/07112000	08242006	UNLIMITED	25.52	0.00
COIS	COST OF INCARCERATION /07112000	08242006	UNLIMITED	99.06	0.00
COI	COST OF INCARCERATION	08242006	UNLIMITED	0.00	0.00
CVC	CRIME VICTIM COMPENSATION	08242006	UNLIMITED	5.85	0.00
COSFD	COS - FELONY DEBT (206)	08242006	161.47	408.53	0.00
COSUD	COS - OMMU DEBT (206)	08242006	50.00	50.00	0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20060908	UNLIMITED	103.21	0.00
POSD	POSTAGE DEBT	10232008	0.68	0.00	0.00
TVRTD	TV RENTAL FEE DEBT	11202008	1.00	0.00	0.00
HYGA	INMATE STORE DEBT	08282006	33.77	3.41	0.00

TRANSACTION DESCRIPTIONS --

SPENDABLE BAL SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE
04/02/2009	CRS SAL ORD #5078911STR		(4.09)	14.77
04/08/2009	COPIES-medical		(0.20)	14.57
04/09/2009	CRS SAL ORD #5090432STR		(3.20)	11.37
04/11/2009	I05 - TV CABLE FEE		(0.50)	10.87
04/14/2009	CRS SAL ORD #5098852STR		(1.68)	9.19
04/15/2009	CLASS 3 GRATUITY-Mar/2009-- Food Svs		55.00	64.19
04/15/2009	Deductions-CVC-08242006 D D		(2.75)	61.44
04/15/2009	Deductions-COSFD-08242006 D D		(11.00)	50.44

05/01/2009 07:15

Department of Corrections

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STAFFORD CREEK CORRECTIONS CENTER

OTRTASTB

TRUST ACCOUNT STATEMENT

6.04.4.0.1.1

DOC# 0000776240 Name: CARTER, GERMAINE D
LOCATION: S01-317-H4111U

BKG# 303118

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE
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