

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

RECEIVED

AUG 08 2019

S.C. SUPREME COURT

JASON ALAN JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000216

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
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 the PCR court erred by finding trial counsel provided effective representation where counsel failed to object to damaging testimony by co-defendant Quinn about Petitioner's irrelevant prior bad acts, which were outside the scope of the conspiracy, which were unduly prejudicial under Rule 403, SCRE, and which impermissibly put Petitioner's character at issue?

STATEMENT

During the June 2011 term of the York County Grand Jury Petitioner was indicted for Trafficking in Methamphetamine (more than one hundred grams), third offense. App. 986 & 1153. Petitioner proceeded to trial in front of the Honorable Lee S. Alford and a jury on January 23, 2012. App.1. Jennifer Colton and Teasa Weaver appeared on behalf of the state and Petitioner was represented by Michael Brown. Id.

After a five-day trial the state rested its case. App. 892. The jury found petitioner guilty of Trafficking in Methamphetamine (more than twenty-eight grams but less than one hundred grams). App. 965. Judge Alford sentenced Petitioner to a term of imprisonment for twenty-eight years. App. 972.

Petitioner was represented by Appellate Defender David Alexander on direct appeal. App. 1126. Following oral argument the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in State v. Johnson, 420 S.C. 10, 763 S.E.2d 36 (2014). Id. The Supreme Court granted certiorari. Id. Following oral argument Petitioner's case was subsequently dismissed as improvidently granted. Id.

Petitioner filed a PCR application on November 16, 2016. App. 977-983. The State filed its Return on April 5, 2017. App. 984-988. Petitioner, through counsel Tommy A. Thomas, filed an amended PCR application alleging, inter alia, that trial counsel was ineffective for failing to object to testimony from Brandi Quinn to acts that were objectionable under Lyle¹. App. 989-990.

An evidentiary hearing took place before the Honorable William A. McKinnon on July 30, 2018. App. 911. Tommy A. Thomas represented Petitioner, Megan Jameson and Janell

¹ State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

Gregory appeared on behalf of the state. Id. Petitioner, trial counsel Michael Brown and the prosecuting Assistant Solicitor Jennifer Colton testified at the hearing. App. 992.

Judge McKinnon's Order of Dismissal was filed on August 30, 2018. App. 1123-1146.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding trial counsel provided effective representation where counsel failed to object to damaging testimony by co-defendant Quinn about Petitioner's irrelevant prior bad acts, which were outside the scope of the conspiracy, which were unduly prejudicial under Rule 403, SCRE, and which impermissibly put Petitioner's character at issue.

Relevant Facts

On February 27, 2011 Petitioner and two co-defendants (Brandi Quinn and Corey Catoe) were arrested at a motel in York County, South Carolina when law enforcement arrived to serve an arrest warrant on Quinn for malicious injury to personal property. App. 327, ll. 14; App. 329, ll. 1-13; App. 332-333; App. 347, ll. 6-7. Initially, Petitioner and co-defendant Catoe were only detained while officers performed a protective sweep of the motel room. App. 334.

During the sweep of the motel room items were observed, to include computers in various stages of disassembly, aluminum foil balls, syringes, and razor blades. App. 334-336. This information was relayed to Deputy John Clark who obtained a search warrant for the motel room, where a "shake and bake"² methamphetamine lab was discovered. App. 385-389. All three individuals were subsequently charged with trafficking methamphetamine. App. 281, ll. 17-19.

The state alleged that Petitioner was the "main cook" and the head of an organization to manufacture and sell meth in York County. App. 279, ll. 4-19. To attempt to prove this allegation the state introduced evidence of an alleged conspiracy, primarily between Petitioner

² The "shake and bake" method, also known as the "one pot" method, refers to a process of making methamphetamine in a single bottle by adding all the necessary ingredients, shaking the bottle to cause a chemical reaction, releasing the pressure and repeating until the methamphetamine is formed. App. 288-292.

and co-defendant Catoe, wherein Petitioner obtained the materials necessary to produce methamphetamine. App. 224. The state alleged that various individuals, known as “smurfs,” purchased pseudoephedrine at different area pharmacies which they then traded with Petitioner for methamphetamine. App. 162.

Petitioner proceeded to trial where co-defendant Brandi Quinn testified against him. App. 457-540. Prior to Quinn taking the stand, defense counsel objected to her testimony arguing that it would allow prior bad act testimony before the jury. App. 439, ll. 1-6. The court overruled this objection after proffering Quinn’s testimony in-camera, finding that it was relevant to establish the conspiracy and permissible under the established case law. App. 448-456. However, when the testimony was presented to the jury, defense counsel did not object to the improper prior bad act evidence thereby failing to preserve the issue for appellate review.

In front of the jury Quinn testified to events that were outside the scope of the conspiracy and therefore should have been objected to by defense counsel. The first objectionable piece of testimony occurred when Quinn stated that Petitioner was in jail prior to the arrest for the charges he was facing at trial. App. 465. Later in her testimony she again noted that Petitioner was in jail on some unrelated charges during the time span of the conspiracy. App. 483.

Next Quinn offered testimony of individuals who had gotten methamphetamine from Petitioner either by trading for the drugs or purchasing them. App. 475-478. From the record it appears the people Quinn named merely had a buyer/seller type relationship with Petitioner or did a one-time trade of Sudafed in order to acquire methamphetamine and were not part of the charged conspiracy. Id.

Lastly, Quinn testified to various instances of drug use by Petitioner that were in no way related to his alleged involvement in the trafficking of methamphetamine. In particular Quinn

testified to Petitioner's use of drugs at the home of two people not connected with the conspiracy, as well as Petitioner's use of other drugs and alcohol, to include Dilaudid. App. 481 & 494.

Discussion

A conspiracy is an agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object or a lawful object by unlawful means. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (citing State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906)). While the essence of a conspiracy is the agreement, it may be proven by specific overt acts done in furtherance of agreement. Id. (Citing State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982); United States v. Sheffer, 896 F.2d 842 (4th Cir.1990)).

"The substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope. Further, the state is permitted great latitude in the introduction of circumstantial evidence to establish the existence of a conspiratorial agreement." Wilson, 315 S.C. at 294. There is however, a limit to what the state can offer to prove the existence of the conspiracy. The acts offered as proof must be relevant and sufficiency related to the conspiracy to be admitted. State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997) (holding the defendants were denied fair trial because the state was permitted to introduce voluminous testimony of other bad acts, particularly dealing with marijuana distribution, in a trafficking cocaine conspiracy case).

Petitioner does not assert that Brandi Quinn's entire testimony was inadmissible prior bad act testimony. Petitioner acknowledges that the jurisprudence of this state allows the admission of evidence directly or circumstantially related to the conspiracy and that that evidence can include prior bad act evidence. However, portions of Quinn's testimony went

beyond the conspiracy, were highly prejudicial, and included irrelevant prior bad acts. These portions of Quinn's testimony should have been objected to by trial counsel.

As stated above, Quinn testified in two instances that Petitioner was in jail prior to his arrest for the charges he was facing at trial. App. 465 and App. 483. The fact that Petitioner was in jail on pending, unrelated charges had nothing to do with the formation or furtherance of the alleged conspiracy. Petitioner's arrest and incarceration on unrelated charges was irrelevant, impermissible character and prior bad act evidence that was prejudicial under 403, SCRE.

Petitioner next takes issue with Quinn's testimony regarding individuals who had gotten methamphetamine from Petitioner either by trading for the drugs or purchasing them. App. 475-478. At no point during the trial were these individuals mentioned as having had a part in the alleged conspiracy run by Petitioner, nor were they called to testify. There was no testimony that these individuals had a consistent active role as "smurfs" for Petitioner or that they were in any way connected to the alleged conspiracy. Id. In fact, at least one of the individuals named was charged in a separate and distinct methamphetamine conspiracy.³ Testimony of these uncharged sales was activity collateral to the formation and furtherance of the alleged conspiracy and was irrelevant prior bad act evidence that was highly prejudicial to Petitioner.

Petitioner also submits that Quinn testified impermissibly regarding various instances of drug use by Petitioner. App. 481 & 494. This testimony was not relevant to the conspiracy the state was alleging and served only to diminish the Petitioner's character in front of the jury.

³Amanda Caudle, who testified as a "smurf," stated that she along with four others were charged in a separate methamphetamine conspiracy case. One of her four co-defendants was Lisa Simmers who was named by Quinn as having purchased methamphetamine from Petitioner. App. 695.

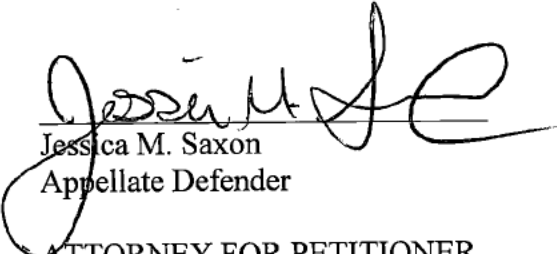
Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (State cannot attack the character of the defendant unless the defendant herself first places her character in issue).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel’s performance was deficient and that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Trial counsel’s failure to object to these portions of Quinn’s testimony that were outside the scope of the conspiracy and were prior bad acts/character evidence inadmissible under Lyle, *supra*, was extremely prejudicial to Petitioner. The prior bad acts and bad character evidence impermissibly made Petitioner’s character an issue at trial and shifted the focus of the trial from the elements of the charge Petitioner faced to whether or not he was a bad person. It can be reasonably concluded that this impermissible evidence made an impact in jury deliberations and contributed to the verdict.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of August, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

JASON ALAN JOHNSON,

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Alan Johnson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge William A. McKinnon, which was held on July 30, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Jason Alan Johnson.

Respectfully Submitted,



Jessica M. Saxon

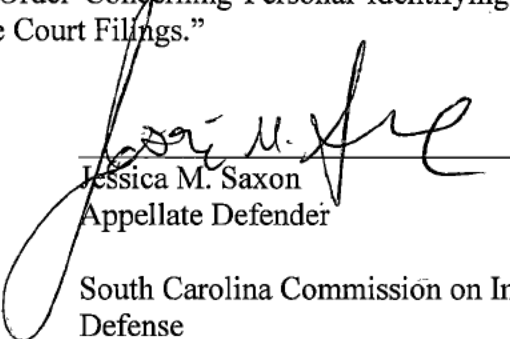
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Jessica M. Saxon
Appellate Defender

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ATTORNEY FOR PETITIONER

This 8th day of August, 2019.

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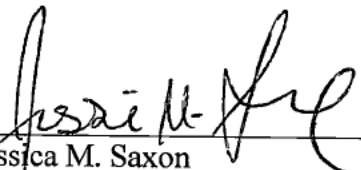
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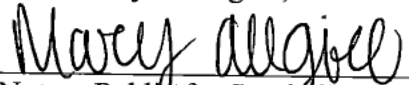
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Jason Alan Johnson, #231457, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of August, 2019.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of August, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.