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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

H. Steven DeBerry, IV, Circuit Court Judge

NICHOLAS BONNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000085

REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. The Petitioner has no Reply to the Respondent's concession that he was entitled to relief pursuant to *White v. State*, 263 SC 110, 208 S.E.2d 35 (1974).

2. The PCR judge erred in refusing to find counsel ineffective for failing to make a contemporaneous objection to the admission of prior bad act testimony.

Petitioner argues that the co-defendant Eric Lattimore's testimony that he had been to Bonner's "a lot" and had seen Bonner dealing out of his house every time and that people went there to get drugs was improper. (R. 161-62, 180-1). In support of this testimony the Respondent cites *State v. Gore* and *State v. Wilson* which are distinguishable in that the charges in those cases were possession with intent to distribute, not trafficking based on the possession of a statutorily sufficient quantity of drugs found in Petitioner's mother's home. *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989), *State v. Wilson*, 545 S.E.2d 827, 345 S.C. 1 (S.C. 2001). Furthermore, those cases address testimony about specific instances of bad acts within a close time frame rather than the general criminal propensity testimony here.

The Respondent argues that counsel's expectation that the trial judge would not sustain an objection and that she desired to avoid bringing attention to the bad act testimony was valid trial strategy. This overextension of what constitutes strategy negates the duty for trial counsel to make contemporaneous objections and preserve the record for appeal. Also, the Respondent's resuscitation of the strength of the State's case is overstated. It fails to mention that all the witnesses at the house said Eric Lattimore brought the drugs to Petitioner's house and that the alleged police informant, Prentiss

Jeffries, denied being at the home within three days of the search. (R. p. 126, l. 21) In fact, the State's case was not particularly strong. As stated in the Petition, the prejudicial effect of the prior bad act testimony is clear and was highlighted in the State's closing argument. (R. 762, l. 21).

3. The PCR judge erred in refusing to find counsel ineffective for failing to take exception to the jury instructions on inference.

The Petitioner points out that the Respondent failed to address the fact that the jury sent a note asking if knowledge of drugs was the same as being guilty of trafficking and was improperly reinstructed regarding inference. Specifically, that knowledge of the presence of the controlled substance could be inferred from possession of the object or premises and that knowledge evidenced intent to control and may be substituted for the intent element. (R. 801, l.22, 802, l.20). This note along with the instruction on inference was a strong indicator that the jury misunderstood the law such that the outcome of the case would have been different had the jury been properly instructed as to the law of the case.

4. The PCR judge erred in refusing to find counsel ineffective for failing to move to suppress evidence or object to its admission.

As to this issue, the Petitioner references the argument presented in the Petition.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, Petitioner respectfully requests the Court grant the Petition and order further briefing on the issues presented.

Respectfully submitted,

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This 18th day of November, 2022.