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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

MARK LORENZO BLAKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000714

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to Deputy Andrew Miller's improper comment about "the drugs he [Petitioner] was selling" pursuant to Rule 404(b), SCRE, since the evidence was inadmissible propensity evidence, and where Petitioner was prejudiced by counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's trial would have been different, particularly where Petitioner was being tried for possession with intent to distribute heroin after heroin was allegedly found in his apartment during the execution of a search warrant?

STATEMENT OF THE CASE

Based on an ongoing narcotics investigation, officers with the Charleston County Sheriff's Office obtained a search warrant for Petitioner's apartment in West Ashley.[1] App. 141, ll. 10-20. To mitigate the risk of potential harm to the officers executing the warrant as well as the community, law enforcement decided to arrest Petitioner away from his residence by way of a "felony traffic stop" before the search warrant was executed. App. 145, ll. 6-25. Agent Frank Waddell conducted surveillance outside Petitioner's apartment and, on the afternoon of February 22, 2013, saw Petitioner leave his apartment, get into his car, and drive away. App. 146, ll. 1-13. Agent Waddell, as well as other officers in both marked and unmarked police vehicles, followed Petitioner. App. 146, l. 14 – 147, l. 21. Petitioner eventually stopped in the parking lot of his girlfriend's place of business. App. 166, ll. 6-22. The officers "pinched in" Petitioner's car, "came out with guns drawn," and loudly demanded that he get out of the car and show his hands. App. 167, ll. 1-19; App. 168, ll. 16-21. When Petitioner, who was on the phone, did not immediately comply, the officers physically removed him from the car, placed him on the ground, and secured him in handcuffs. App. 148, ll. 7-21; App. 169, ll. 1-12. Once Petitioner was in custody, Agent Waddell went inside the business and also arrested Petitioner's girlfriend, Dominique Jeter. App. 169, l. 22 – 170, l. 1.

Law enforcement then took Petitioner and Jeter back to their apartment and executed the search warrant while the pair waited outside. App. 170, ll. 2-5; App. 176, ll. 1-5. The officers claimed they "made a soft entry" into the apartment by using Petitioner's key. App. 149, ll. 2-

[1] Agent Frank Waddell, the lead investigator, claimed the "investigation included controlled purchases" at the residence, which "was the basis for the search warrant." However, trial counsel immediately objected to this testimony pursuant to Rule 404(b), SCRE. The trial judge properly sustained the objection and struck the question and answer from the record. App. 143, l. 17 – 144, l. 9.

12; App. 171, ll. 10-17. However, there was unexplained damage to the front door of the residence suggesting law enforcement forced entry instead. App. 172, l. 16 – 175, l. 18; App. 232, l. 21 – 233, l. 23.

During the search, officers allegedly found a brown powdered substance, which was later confirmed to be heroin, in a Tupperware container inside the refrigerator. App. 162, ll. 17-22; App. 221, ll. 9-10; App. 307, ll. 21-23. The state claimed the heroin was packaged for sale. There were eleven "bundles" of heroin which each contained ten "bindles." The group of ten "bindles" was secured together with a rubber band to make a "bundle." App. 160, l. 18 – 161, l. 6; App. 218, ll. 12-17. A "bindle" of heroin typically contains .01 to .03 grams of heroin. App. 160, ll. 23-25; App. 234, ll. 3-7.

Deputy Andrew Miller admitted that eleven "bundles" of heroin, which was the amount allegedly found in Petitioner's refrigerator, would typically contain two to three grams of heroin. App. 234, l. 17 – 235, l. 2. However, before charging Petitioner, law enforcement chose to weigh the suspected heroin along with its packaging. The "gross aggregate weight" was allegedly thirty grams. Consequently, Petitioner was charged with trafficking thirty grams of heroin, a more serious offense than possession with intent to distribute, the charge he was subsequently indicted and tried for. App. 180, l. 4 – 181, l. 14. The chemist from the Charleston Police Department who analyzed the substance testified that the total weight was 1.12 grams. App. 308, l. 3.

A Charleston County Grand Jury indicted Petitioner on June 3, 2013 for possession with intent to distribute heroin. App. 600-601. His case was called to trial on June 14, 2016 before the Honorable D. Garrison Hill, and a jury. App. 1. Assistant Solicitors Stephanie Linder and Lauren Frierson represented the state. App. 1. Jason King represented Petitioner. App. 1. The

jury found Petitioner guilty as indicted. App. 380, l. 20 – 381, l. 8. He was sentenced to twelve years imprisonment. App. 389, ll. 21-24.

Petitioner timely filed a notice of appeal. Following briefing, the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Mark Lorenzo Blake, Jr., Op. No. 2018-UP-111 (S.C. Ct. App. filed March 14, 2018); App. 438-439. On March 29, 2018, Petitioner filed a petition for rehearing. App. 440-453. By order filed April 26, 2018, the Court of Appeals denied the petition for rehearing. App. 454. On May 25, 2018, Petitioner filed a petition for writ of certiorari with this Court. App. 455-473. The state filed a return to this petition on June 25, 2018. App. 474-499. By order dated November 9, 2018, this Court denied the petition for writ of certiorari. App. 500.

On June 18, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 501-513. The state filed a return to this application on October 18, 2019. App. 514-520. An evidentiary hearing was held on December 9, 2021 before the Honorable Jennifer B. McCoy. App. 521. Assistant Attorneys General Lauren Mims and Samantha Weidauer represented the state. App. 521. Christopher Murphy represented Petitioner. App. 521.

At the beginning of the hearing, PCR counsel outlined the five allegations of ineffective assistance of trial counsel Petitioner intended to present. App. 525, ll. 8-14. One of the allegations was trial counsel's failure to object to Deputy Andrew Miller's comment about Petitioner selling drugs and move for a mistrial because of this improper testimony. Counsel emphasized that trial counsel objected to similar comments made by Agent Frank Waddell and the objection was sustained. App. 525, l. 24 – 526, l. 8.

During trial, the following exchange took place between the assistant solicitor and Deputy Miller:

Q: And what do rubber bands[2] indicate to you in your training and experience with regards to narcotics in the narcotics trade?

A: In my training and experience[e], this is how they would in - - **especially with the drugs that he [Petitioner] was selling**, how they would keep those together. They would wrap it up so they wouldn't lose any of the drugs that were inside.

App. 217, ll. 8-15 (emphasis added).

When questioned as to why he did not object to this unduly prejudicial testimony, trial counsel, Jason King, testified that he could not remember why he did not object or whether he had a strategic reason for failing to do so. App. 560, ll. 6-12.

By order filed May 10, 2022, the PCR judge denied Petitioner relief. App. 569-599. The judge found Petitioner failed to prove trial counsel was deficient or that he was prejudiced by counsel's failure to object to Deputy Miller's above testimony. App. 594. The judge concluded that even if the testimony was improper, it "does not rise to the level of manifest necessity required to warrant a mistrial." App. 596. Consequently, the judge determined trial counsel could not "be deemed deficient for failing to object to the statements or move for a mistrial." App. 596. Moreover, the judge found Petitioner failed to present any evidence that counsel's failure to object prejudiced Petitioner or had an effect on the outcome of his trial. App. 596. For whatever reason, the PCR judge never specifically addressed whether Deputy Miller's testimony was improper and whether trial counsel should have objected.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by trial counsel's failure to object to Deputy Miller's comment about Petitioner selling drugs pursuant to Rule 404(b), SCRE, since the evidence was improper propensity evidence, and where Petitioner was prejudiced by counsel's deficient performance

[2] Law enforcement found "a large amount of rubber bands" inside Petitioner's apartment during the execution of the search warrant. App. 216, l. 15 – 217, l. 24.

since there is a reasonable probability the outcome of his trial would have been different had counsel properly objected, particularly given that Petitioner was being tried for possession *with intent to distribute*, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to object to Deputy Andrew Miller's improper comment about "the drugs he [Petitioner] was selling" pursuant to Rule 404(b), SCRE, since the evidence was inadmissible propensity evidence, and where Petitioner was prejudiced by counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's trial would have been different, particularly where Petitioner was being tried for possession with intent to distribute heroin after heroin was allegedly found in his apartment during the execution of a search warrant.

Trial counsel was ineffective for failing to object to Deputy Miller's improper comment about "the drugs he [Petitioner] was selling" pursuant to Rule 404(b), SCRE, since the evidence was inadmissible propensity evidence. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected and the testimony was stricken from the record. Petitioner was being tried for possession with intent to distribute heroin. The state presented no evidence connecting Petitioner to the heroin found in his apartment. Accordingly, the jury likely inferred that Petitioner constructively possessed the heroin because he had a general propensity to sell drugs based on Deputy Miller's inadmissible testimony.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). "South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id.

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." Clasby, 385 S.C. at 155, 682 S.E.2d at 895 (quoting State v. Gaines, 380 S.C.

23, 29, 667 S.E.2d 728, 731 (2008) (internal quotation marks omitted). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (quoting Gaines, 380 S.C. at 29, 667 S.E.2d at 731) (internal quotation marks omitted). "Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Cope, 405 S.C. at 337-38, 748 S.E.2d at 204-05 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896); See Rule 403, SCRE. "Unfair prejudice means 'an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Sweat, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)) (alteration in original).

In State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), the Court of Appeals affirmed the admission of evidence of a prior bad act of domestic violence pursuant to Rule 404(b), and as part of the *res gestae*. Sweat was charged with first degree burglary, assault and battery with intent to kill, and three counts of assault of a high and aggravated nature after he invaded a home occupied by his estranged wife, her boyfriend, and several others on December 11, 2001. Sweat, 362 S.C. at 121-22, 606 S.E.2d at 510-11. The state introduced testimony from Sweat's estranged wife about a domestic violence incident that took place two months earlier in October 2001. Id. at 122, 606 S.E.2d at 511. Sweat's wife reported the prior incident to law enforcement and Sweat spent forty-five days in jail. Id. While he was in jail, Sweat's wife ended their relationship and became romantically involved with another man. Id.

The Court of Appeals held the prior episode of domestic violence was admissible under Rule 404(b) as evidence of motive and intent. Id. at 124, 606 S.E.2d at 512. The court found

from the October incident that the jury could have inferred both (1) motive—that Sweat was driven by anger over his estranged wife causing him to go to jail and terminating their relationship; and (2) intent—that Sweat maliciously sought to inflict harm upon his estranged wife and her boyfriend. Id. at 126, 606 S.E.2d at 513. The court held the evidence was relevant because it tended to make the state's version of the case more probable and was logically related to why Sweat went to the house that night and to his intentions once there. Id. at 127, 606 S.E.2d at 514.

Additionally, the court held the evidence was admissible as part of the *res gestae* and was properly admitted to "complete the story of the crime on trial." Id. at 133, 606 S.E.2d at 517. The court concluded that the October incident, and the events that followed, including Sweat's estranged wife moving out and ending their relationship, provided the jury with "an appropriate context in which to place the December 11 attack." Id.

In State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), this Court held it was reversible error to admit evidence of prior thefts allegedly committed by King as evidence of motive or as part of the *res gestae*. King was accused of murdering his father-in-law, Billy Turbeville. Turbeville received two checks each month totally $2200. After paying his monthly bills totaling $400, Turbeville kept the remaining cash inside his wallet in the front pocket of his pants. No wallet or cash was found on Mr. Turbeville when his body was discovered. King, 334 S.C. at 508, 514 S.E.2d at 580. The trial court allowed King's ex-wife to testify that King regularly pawned household items, stole cash from her purse, forged checks on her bank account, stole cash from her bank account by using her ATM card, and stopped paying his share of the bills in the months that preceded the murder. Id. at 511, 514 S.E.2d at 582.

After considering both Rule 404(b), SCRE, and the *res gestae* theory, this Court held the remote thefts were not admissible under any theory, and that the evidence merely showed King's bad character and his propensity to commit crimes. Id. at 513, 514 S.E.2d at 583. The Court further held the admission of the evidence was not harmless because the prior thefts suggested King had a drug problem, which was highly prejudicial, and all the evidence against King was circumstantial. Id. at 514, 514 S.C. at 583.

In State v. Ostrowski, 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021), the appellant was convicted of trafficking methamphetamine after methamphetamine, materials used to package drugs, a digital scale, and a glass pipe were seized from Ostrowski's home during the execution of a search warrant. Id. at 374, 867 S.E.2d at 274. The methamphetamine was found in the right front pants pocket from a pair of men's pants that were seized from a makeshift closet. Id. The Court of Appeals held the trial judge erred by admitting text messages sent and received by the phone seized from Ostrowski during his arrest. The text messages showed Ostrowski was selling drugs. Id. at 377, 867 S.E.2d at 275-76.

Ostrowski objected to the admission of the text messages pursuant to Rule 404(b), SCRE. He argued on appeal that the text messages were used by the state as improper character evidence to show Ostrowski was attempting to traffic the drugs found in his apartment because he had a general propensity to traffic drugs. Id. at 390, 867 S.E.2d at 282. The state argued the evidence was admissible to show identity and intent. Id. at 392, 867 S.E.2d at 283. The Court of Appeals disagreed. Id. The court asserted, "The inference that the State clearly wanted jurors to draw was that because some of the text messages indicated [Ostrowski] was dealing drugs earlier . . . then he must have owned the drugs found [in his house]." Id. at 392-93, 867 S.E.2d at 283-84. However, the court held the state failed to present any evidence to illustrate how the text

messages, even if they do prove a drug trafficking scheme, connected Ostrowski to the specific drugs found in his house during the execution of the warrant. Id. at 392, 867 S.E.2d at 283.

As to intent, the Court of Appeals emphasized that the statute codifying trafficking methamphetamine did not require Ostrowski to have any intent beyond knowing possession of the requisite amount of methamphetamine. Id. at 392, 867 S.E.2d at 284 (citing S.C. Code. Ann. § 44-53-375(C) (making it a crime to traffic methamphetamine or "knowingly [be] in actual or constructive possession or . . . knowingly attempt[] to become in actual or constructive possession of ten grams or more of methamphetamine"). Showing that the defendant had intent to distribute the drugs is not listed in the statute as necessary for a conviction. Id. The court asserted that the state could use any text messages that showed or tended to show that Ostrowski was in possession of the drugs found in his residence, but none of the messages did so. Rather, they established Ostrowski dealt drugs, at times from his home. Id. at 396, 867 S.E.2d at 285.

Moreover, the Court of Appeals held the probative value of the text messages was small given that Ostrowski did not need to have a subjective intent to traffic the drugs in order to be convicted under the statute. Id. at 398, 867 S.E.2d at 286. However, the evidence was unfairly prejudicial as the messages included crude and threatening language and appeared to have little to no connection to the drugs allegedly found in Ostrowski's house. Id. at 398, 867 S.E.2d at 287. The state also referred to the text messages as the "strongest evidence in this case." Id. at 399, 867 S.E.2d at 287. The Court of Appeals ultimately reversed Ostrowski trafficking conviction and remanded for a new trial.

In this case, trial counsel was ineffective for failing to object to Deputy Miller's improper comment about "the drugs he [Petitioner] was selling" pursuant to Rule 404(b), SCRE, since the evidence was inadmissible propensity evidence. The remark improperly suggested to the jury

that because Petitioner previously sold drugs, he must have constructively possessed the heroin found in his apartment. Stated differently, the jury likely inferred that Petitioner possessed the heroin because he had a general propensity to sell drugs.

For the same reasons the Court of Appeals held the text messages in Ostrowski, which showed Ostrowski sold drugs, were not admissible to show intent or identity, the only relevant exceptions found in Rule 404(b), the evidence that Petitioner previously sold drugs was not admissible here. Deputy Miller's remark that Petitioner sold drugs did not connect him to the drugs found in his apartment during the execution of the search warrant. Moreover, the state did not have to prove Petitioner had any intent beyond knowing possession of the requisite amount of heroin. See App. 363, ll. 2-4 ("Possession of two or more grains of heroin creates an inference that the Defendant possessed the heroin with intent to distribute); See also S.C. Code Ann. § 44-53-370. Consequently, trial counsel should have objected to Deputy Miller's improper comment and moved to strike the testimony from the record as it was inadmissible pursuant to Rule 404(b). Notably, counsel testified during the evidentiary hearing that he did not know why he did not object, indicating he did not have a strategic reason for failing to do so.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected and the testimony was stricken from the record. Petitioner was being tried for possession with intent to distribute heroin. Consequently, the state had to prove beyond a reasonable doubt that Petitioner knowingly possessed the requisite amount of heroin. See App. 363, ll. 2-4 ("Possession of two or more grains of heroin creates an inference that the Defendant possessed the heroin with intent to distribute); See also S.C. Code Ann. § 44-53-370. There is a reasonable probability that the jury relied on Deputy Miller's inadmissible remark to find the

state met this element of the offense. The state presented no evidence connecting Petitioner to the heroin found in his apartment. Accordingly, the jury likely inferred that Petitioner possessed the heroin allegedly found in his apartment because he had a general propensity to sell drugs based on Deputy Miller's inadmissible testimony.

Respectfully, this Court should hold the PCR judge erred by finding trial counsel was not ineffective, reverse Petitioner's conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing. Petitioner ultimately requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of December, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

MARK LORENZO BLAKE,

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STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000714

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the petition for writ of certiorari and the appendix in the above referenced case have been served upon Samantha Weidauer, Esquire, at her primary e-mail address listed in the Attorney Information System (AIS), and on Mark Lorenzo Blake, #368687, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 13th day of December, 2022.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER