STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

ALEXANDER RASHEEN MATTHEWS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000518

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did Counsel provide ineffective assistance by failing to move for the trial court to apply the Colf[1] factors in weighing the admissibility of Petitioner's burglary and voluntary manslaughter prior convictions before allowing the State to use them for impeachment of Petitioner's testimony at his bench trial for first-degree burglary, murder, and arson?

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[1] State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

STATEMENT

Petitioner Alexander Rasheen Matthews was indicted for third-degree arson, murder, and first-degree burglary by the Spartanburg County grand jury. App. 428-31. His case proceeded to a bench trial before the Honorable J. Mark Hayes, II, from January 23rd through 25th, 2018. Richard Whelchel (Counsel) and Daniel James MacDonald, IV, represented Petitioner, while the State was represented by Abel Orlando Gray and Allison Margaret Mabbs. App. 1; App. 8, l. 12—App. 10, l. 18.

Prior to witnesses being called, the State indicated that notice had been served upon the defense regarding the use of Petitioner's prior convictions pursuant to Rule 609, SCRE. App. 11, ll. 8-9. No further discussion or argument was made by Counsel regarding the matter during pretrial motions. App. 11, l. 5—App. 15, l. 10.

Petitioner testified at his trial. During cross examination, the State sought to impeach Petitioner regarding his prior convictions of voluntary manslaughter and first-degree burglary. Counsel objected under Rule 609 that the convictions were outside the 10-year period prior to trial, and that their prejudicial effect outweighed the probative value. App. 282, l. 3—App. 283, l. 1. Because the trial court was also the finder of fact, Counsel further asked the judge "to disregard something that you're going to have to hear and then disregard." App. 283, ll. 1-4. The State acknowledged it was seeking to use Petitioner's prior convictions for purposes of impeachment, and "also to get into evidence about the previous situation" because Petitioner previously indicated a mistake regarding names. App. 283, ll. 5-14. However, Counsel did not move for the trial court to conduct the necessary five-factor balancing analysis on the record prior to admission.

Without performing any weighing analysis, the trial court ruled as follows: "All right. I will allow it for that limited purpose. I would not consider it for any other purposes." App. 283, l. 24—App. 284, l. 1. The State then proceeded to introduce Petitioner's prior convictions for voluntary manslaughter and first-degree burglary, and the State asserted Petitioner pled guilty under a different name. Petitioner acknowledged he pled guilty to the offenses, but denied he did so under another name and pointed out that he did not sign the document containing the incorrect name.

The trial court ultimately found Petitioner not guilty of first-degree burglary, but guilty of third-degree arson, and voluntary manslaughter as a lesser-included offense of murder. App. 293, ll. 6-15; App. 305, ll. 5-9. Petitioner was sentenced to the following concurrent terms of imprisonment: twenty-five (25) years for voluntary manslaughter; and fifteen (15) years for third-degree arson. Credit of 718 days was given for time served. App. 310, ll. 9-14.

Petitioner appealed his convictions and sentences. On June 10, 2020, the South Carolina Court of Appeals affirmed in an unpublished *per curiam* opinion. App. 312-14. Remittitur was sent on August 19, 2020. App. 315.

On August 12, 2020, Petitioner filed his application for post-conviction relief (PCR), alleging *inter alia*, that Counsel was ineffective for failing to suppress his prior convictions for voluntary manslaughter and burglary. App. 316; App. 324. On April 21, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan, Jr. App. 341. Petitioner was represented by Susannah Ross, while the State was represented by Chelsea Marto. App. 341.

At the hearing, Petitioner indicated he did not believe it was fair that the trial court knew of his prior convictions when deciding his case, and believed it prejudiced the result. App. 351, ll. 6-15. Counsel also testified at the hearing, and agreed that "a good deal of evidence of

[Petitioner's] prior history came before the Court." App. 385, ll. 18-21. When asked if he recalled a "specific reasoned weighing" occurring before the trial court admitted Petitioner's prior record, Counsel testified as follows:

> Well, I would be asking the judge, who was trier of fact, to disregard what he's going to hear when I'm making the motion for him to disregard as trier of fact. It would be completely different if we'd had a jury trial, because they wouldn't hear what I'm asking them to—that they not be allowed to hear to begin with. But with a circuit judge, that's—that's not the case.

App. 385, l. 22—App. 386, l. 6. Further, on cross examination, Counsel agreed that he "decided not to pursue pretrial motions . . . because he did not want to draw the Court's attention to those issues later that it would otherwise be." App. 390, ll. 1-5. Counsel also indicated that he did not pursue pretrial motions in Petitioner's case because he "didn't think that it would—that they would go anywhere," and they would be denied. App. 390, ll. 4-8.

On March 17, 2023, the PCR Court dismissed Petitioner's PCR application. As to the issue regarding admission of Petitioner's prior convictions, the PCR Court held as follows:

> This Court finds Counsel's decision not to object was reasonable. Specifically, Counsel reasonably concluded that objecting would be fruitless because the prior convictions would be considered by the Court, with or without an objection, because the judge ruling on the objection was also ruling on the trial. Further, there is no evidence of prejudice, especially since this was a bench trial. Accordingly, relief is denied on this ground.

App. 424. This petition follows.

ARGUMENT

Counsel provided ineffective assistance by failing to move for the trial court to apply the Colf factors in weighing the admissibility of Petitioner's burglary and voluntary manslaughter prior convictions before allowing the State to use them for impeachment of Petitioner's testimony at his bench trial for first-degree burglary, murder, and arson.

When asserting a claim of ineffective assistance of counsel, the applicable standard is whether Counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the Petitioner 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." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed. 2d 674, 698 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

In the present case, Counsel was ineffective for failing to correctly object to the State's use of Petitioner's prior convictions for burglary and voluntary manslaughter to impeach his testimony; although Counsel made an objection based upon Rule 209, SCRE, he failed to demand that the trial court first apply the five factors necessary in weighing admissibility of such evidence.

Evidence of prior convictions of the accused is limited when he testifies at trial. Specifically, Rule 609 of the South Carolina Rules of Evidence provides in pertinent part as follows:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of

> admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old a calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to us such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609(a) and (b), SCRE.

However, admissibility of prior convictions pursuant to this rule first requires a balancing test to occur on the record. In State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), our Supreme Court addressed the necessity of "conducting a balancing test and articulating for the record specific facts and circumstances to overcome Rule 609(b)'s presumption against admissibility." Id. 337 S.C. at 626, 525 S.E.2d at 248. Specifically, the Court approved of the following five factors for trial judges to use when "determining whether the probative value of a prior conviction outweighs its prejudicial effect":

> 1. The impeachment value of the prior crime.
>
> 2. The point in time of the conviction and the witness's subsequent history.
>
> 3. The similarity between the past crime and the charged crime.
>
> 4. The importance of the defendant's testimony.
>
> 5. The centrality of the credibility issue.

Colf, 337 S.C. at 627, 525 S.E.2d at 248. Although not exclusive, these factors have been applied by the South Carolina Supreme Court in analyzing the admissibility of prior convictions under Rule 609(a)(1) as well. See Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000) (citing Colf, 337 S.C. 622, 525 S.E.2d 246). Indeed, the Supreme Court has held that trial counsel's failure to argue such issues was reversible error. Id. 338 S.C. at 434, 527 S.E.2d at 101.

In the case at bar, although Counsel objected to the State's use of Petitioner's prior convictions for voluntary manslaughter and first-degree burglary, he failed to move for the trial court to apply the Colf balancing test factors. Contrary to the PCR Court's ruling, Counsel was still required to make all necessary motions and objections in Petitioner's defense regardless of whether Petitioner's case was tried to a jury or to the court; succinctly stated, Counsel was not absolved of this duty simply because it was a bench trial. See, e.g., Lake City v. Gilliland, 101 S.C. 152, 85 S.E. 312, 312 (1915) (holding appellant's right at his bench trial to have testimony written down and signed by witnesses was waived when counsel failed to make the proper objection); see also 75B Am. Jur. 2d Trial § 1578 ("The general rule as to the necessity of raising objections and reserving exceptions to rulings of trial courts applies in trials to the court.").

Had he done so, the State would have been barred from using Petitioner's prior convictions. Under the first factor, the impeachment value of the prior offenses was low, especially where neither offense was probative of truthfulness. "[M]anslaughter offenses, while crimes of violence, are not crimes of dishonesty or untruthfulness that directly impact the witness's veracity." State v. Black, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). Further, "a conviction for robbery, *burglary* theft, and drug possession, beyond the basic crime itself, is not probative for truthfulness." State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006) (emphasis added). As such, the first factor weighs against admissibility.

Second, as Counsel indicated more than 10 years had expired since petitioner was convicted of voluntary manslaughter and first-degree burglary.[2] App. 282, ll. 14-21. In other words, the convictions should have been sufficiently remote in time from Petitioner's testimony as to weigh against admission for impeachment. Further, even if the release date was within the 10 year time limit under Rule 609 (b), SCRE, the Court nonetheless would have been required to weigh the remaining factors. See, e.g., Green, 338 S.C. at 433-34, 527 S.E.2d at 101; see also Colf, 337 S.C. 622, 525 S.E.2d 246.

Third, the similarities between the past crimes and the charged crimes were extremely high. "[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." Bryant, 369 S.C. at 517–18, 633 S.E.2d at 156 (citing Colf, 337 S.C. at 628, 525 S.E.2d at 249). This is primarily because proof of prior convictions of the same offense at a defendant's later trial is tantamount to propensity evidence. State v. Robinson, 426 S.C. 579, 600-01, 828 S.E.2d 203, 214 (2019). Here, Petitioner was on trial for charges including murder (with the lesser-included offense of voluntary manslaughter) and first-degree burglary, and the State sought to impeach Petitioner with prior convictions of voluntary manslaughter and first-degree burglary. As such, the third factor likewise weighs heavily against admission.

Fourth, Petitioner's testimony was crucial to his defense. Although his prior statement to police was admitted at trial, only Petitioner could refute other eyewitness testimony and adequately explain why his DNA was discovered on the victim in the case through his

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2 The second-degree burglary—to which Petitioner pled after the present incident but prior to trial—was apparently after the first-degree burglary and voluntary manslaughter incident occurring in Charleston. App. 305, ll. 18-23; App. 307, ll. 7-16. Nonetheless, the nature of the offense of second-degree burglary is substantially similar to the first-degree burglary for which Petitioner stood trial.

interposition between the victim and his girlfriend's sister, Samantha Brewton, when the women were fighting earlier on June 16, 2014 before the fire occurred on June 17, 2014. App. 131, l. 18—App. 132, l. 12; App. 138, ll. 10-16; App. 140, ll. 3-20; App. 187, l. 15—App. 188, l. 25; App. 196, l. 15—App. 198, l. 10; App. 270, l. 6—App. 272, l. 5; App. 273, l. 20—App. 274, l. 9; App. 278, l. 13—App. 281, l. 4; App. 286, l. 5—App. 287, l. 11; App. 289, l. 8—App. 290, l. 15. Further, only by testifying could the finder of fact observe Petitioner's demeanor when denying the State's allegations--including his denial of ever showering with his clothes on ostensibly to remove evidence of arson. App. 141, l. 18—App. 142, l. 16; App. 150, l. 5—App. 151, l. 14; App. 152, ll. 6-19; App. 154, l. 8—App. 155, l. 10; App. 158, l. 8—App. 161, l. 20; App. 273, l. 20—App. 274, l. 9; App. 281, ll. 5-14. Accordingly, Petitioner's testimony was essential to his case, and the fourth factor weighs in his favor.

Finally, Petitioner's credibility was critical to his defense. The State's case against him focused on Petitioner's DNA present at the scene, as well as eyewitness testimony that changed between the original inquiry into the matter and testimony at trial. Thus, the credibility of Petitioner's testimony explaining his presence of DNA on the victim, as well as refuting the eyewitness' version of events was central to Petitioner's defense. Thus, the final factor weighs against admissibility as well.

Had Counsel objected to admission of Petitioner's prior convictions under the correct basis by demanding the court apply the Colf weighing test on the record, then the trial court would have performed the required analysis using the Colf factors. As illustrated above, had the trial court applied the Colf factors to Petitioner's case, the State would have been barred from impeaching Petitioner's testimony with his prior convictions of voluntary manslaughter and first-degree burglary. Accordingly, Counsel's performance fell below an objective standard of

reasonableness. Strickland, 66 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed. 2d at 698; Green, 338 S.C. at 434, 527 S.E.2d at 101.

Petitioner was also prejudiced by Counsel's constitutionally deficient performance. As indicated above, the fact finder should not have considered Petitioner's prior convictions for any purpose whatsoever. Yet, after the matter was brought to the trial court's attention without mention of the necessity to apply the Colf balancing test, the court determined it would allow the State to impeach Petitioner's testimony with the highly prejudicial evidence: "All right. I will allow it for that limited purpose. I would not consider it for any other purposes." App. 283, l. 24—App. 284, l. 1. The State then proceeded to introduce Petitioner's prior convictions for voluntary manslaughter and first-degree burglary, even though they had nothing to do with the present charges yet were strikingly similar in nature. In other words, contrary to the PCR Court's rationale, the pertinent question was not whether the finder of fact was a jury or a judge; rather, the appropriate question was whether such inadmissible evidence could be considered by the fact finder when determining the case. App. 424. Here, because Petitioner's prior convictions were impermissibly admitted due to Counsel's deficient performance, the judge—as fact finder—was free to impermissibly utilize and consider Petitioner's prior convictions for the purpose of impeaching his credibility in a case where the credibility of Petitioner's testimony was crucial to his defense. Accordingly, Petitioner was prejudiced. Strickland, 66 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed. 2d at 698; Green, 338 S.C. at 434, 527 S.E.2d at 101.

CONCLUSION

For the foregoing reasons, Petitioner Alexander Matthews respectfully requests reversal of the PCR Court's order of dismissal, reversal of his convictions and sentences, and remand for a new trial.

Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of October, 2023.

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ALEXANDER RASHEEN MATTHEWS,

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V.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alexander Rasheen Matthews states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge G.D. Morgan, Jr., which was held on April 21, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Alexander Rasheen Matthews.

Respectfully Submitted,

Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of October, 2023.