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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

Opinion No. 2023-UP-406

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

CARNIE NORRIS,

PETITIONER

APPELLATE CASE NO. 2019-000334

PETITION FOR REHEARING

On December 20, 2023, this Court issued an unpublished opinion reversing the decision of the PCR court granting Petitioner a new trial arising out of his armed robbery conviction from July 7, 2009. *See* Norris v. State, No. 2023-UP-406 (S.C. Ct. App. filed Dec. 20, 2023). In reversing, this Court found “the PCR court erred in finding that there was a reasonable probability the outcome of the trial would have been different but for trial counsel's errors.” Norris, No. 2023-UP-406 at 5.

Pursuant to Rule 221(a), SCACR, Carnie Norris requests that this Court grant rehearing because this Court has failed to give appropriate deference to the PCR court’s findings of fact

concerning whether the prior criminal convictions would have been admissible at trial and the prejudicial impact of the improperly admitted felony convictions and is, in effect, substituting its own finding of facts with that of the PCR court concerning these issues.

This Court does appear to accept trial counsel was in error in not contesting the admission of the prior felony convictions.¹ This finding is in keeping with this Court's opinion in State v. Broadnax, 401 S.C. 238, 246, 736 S.E.2d 688, 692 (Ct. App. 2013) which acknowledged our Supreme Court's holding in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) that a "conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." Id. 369 S.C. at 517, 633 S.E.2d at 155.

The admissibility of the prior convictions.

This Court does question the PCR court's factual finding that had trial counsel "opposed the introduction of the two prior convictions it is more likely than not that the trial judge would have excluded the use of those convictions." App. 509. This Court notes the PCR court considered the appropriate factors in making this determination:

- (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 of the past crime and the charged crime;
- (4) The importance of the defendant's testimony; and
- (5) The centrality of the credibility issue.

State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

This Court noted the trial court could have reached a different conclusion than the PCR court regarding the impeachment value, the timing, and the impact on credibility. For example, under the impeachment value factor, this Court noted that "[e]ven if these crimes were not crimes of dishonesty, they would still have impeachment value if Norris's conduct involved

¹"Regardless of whether trial counsel was deficient . . ." Norris, No. 2023-UP-406 at 5.

deceit, fraud, a false statement, or anything reflecting on his credibility.” Norris, No. 2023-UP-406 at 5.

The PCR court did not in fact rule the prior convictions lacked any impeachment value.

To the contrary, the PCR court held:

The first factor is the impeachment value of the prior crime. Under State v. Bryant, “a conviction for robbery, burglary, theft, and drug possession, *beyond the basic crime itself*, is not probative of truthfulness.”

App. 507 (emphasis added). In quoting Bryant, the PCR court acknowledged the impeachment value of criminal convictions for the basic crime itself but emphasized the convictions in the present case were not “crimes of dishonesty” as a matter of law. App. 507.

Likewise, on the timing aspect of the criminal charges, this Court noted “While the convictions were somewhat dated, they were not remote under Rule 609(b), SCRE. Norris had been released from prison roughly five years before trial. The trial court could have found this proximity cut in favor of admitting the evidence.” Norris, No. 2023-UP-406 at 5. By implication, this Court’s phrasing also acknowledges the trial court could have, as the PCR court did, find the delay between release and new charges weighed against admission.

Under credibility, this Court held since “Norris's credibility was central weighs in favor of admitting the evidence.” Norris, No. 2023-UP-406 at 5. However, the PCR court never ruled that since Norris’ credibility was central, it would weigh this factor against admission of the prior convictions. This portion of the PCR order followed the similarity of convictions analysis which weighed heavily against admission, and the PCR court noted the “use of the prior convictions harmed undoubtedly the Applicant's ability to have the jury fairly consider his version of events.” App. 508. This Court even notes the balancing of these two elements would have likely resulted in the “circuit court judge ‘sanitizing’ the prior convictions in an attempt to cure unfair

prejudice.” Norris, No. 2023-UP-406 at 5. This admission by the Court, that there was unfair prejudice, precludes a finding that the PCR court abused its discretion in reaching the same conclusion.

On the similarity of the crimes, this Court discounts the state’s *admissions* to the PCR court that the common law robbery was similar to the armed robbery charge and thus enhanced its prejudicial nature:

Additionally, while Applicant's prior conviction for common law robbery is similar to armed robbery in that they are both robberies, they are not identical. The Supreme Court of South Carolina has held although the “admission of identical convictions for impeachment purposes enhances its prejudicial nature, it does not conclusively render the error so prejudicial that it is not subject to a harmless error analysis.” State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015).

App. 521. Since the state admitted both the similar natures of the crimes and the enhanced prejudicial impact inherent in such convictions, this Court’s concern on the need of petitioner to have added additional facts in this regard would be redundant. Moreover, the PCR court made the notation regarding the lack of supporting detail in referencing the original trial, not the PCR hearing. “No additional evidence was *given by the prosecution when those convictions were proffered* that there was anything about the facts surrounding the convictions that showed any dishonesty.” App. 507 (emphasis added).

“[E]vidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions.” State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000). “[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.

The PCR court and this Court disagree on the likely admissibility of the crimes in question, despite both courts applying the same balancing factors outlined in Colf and Bryant. This is the nature of a discretionary ruling. Two different courts may well reach different conclusions in balancing the same factors.

In any given case involving the same indicted charges, two different trial courts could examine the same prior conviction(s), evaluate the same five *Colf* factors, and perhaps reach opposite conclusions as to the admissibility of the prior convictions. In such an instance, it is conceivable that under our standard of review, both trial courts would be affirmed. *This is the nature of our standard of review in Rule 609(a)(1) cases when a trial court weighs the probative value of a prior conviction against its prejudicial effect.*

State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019) (emphasis added).

The standard of review in evaluating a balancing of a discretionary ruling by the PCR court dictates such ruling be upheld if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Here, this Court's disagreement over the conclusion by the PCR court following that balancing does not give appropriate deference to the PCR court's ruling.

The prejudicial impact.

This Court also improperly discounts the PCR court's findings of fact concerning the prejudicial impact of the admission of the common law robbery conviction. In its order, the PCR court found the "case had two competing and diametrically opposed narratives, one for the prosecution and one for the defense. *The use of the prior convictions harmed undoubtedly the Applicant's ability to have the jury fairly consider his version of events.*" App. 508 (emphasis added).

This Court is required to provide appropriate deference to the PCR court's finding of fact concerning prejudice.

While all of this evidence could indicate the jury was certain to find Briggs guilty—regardless of Arroyo-Staggs' improper bolstering—our decision is governed by the standard of review. *We defer to a PCR court's findings of fact, and we will uphold them if there is evidence in the record to support them.*

Briggs v. State, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) (emphasis added).

As found by the PCR court, Norris was entitled to have the jury “fairly consider his version of events” uncolored by the prejudicial introduction of a similar criminal conviction.

App. 508. This Court recounted the facts that supported guilt:

Here, Victim and two witnesses testified Norris threatened Victim with a knife and took his wallet. They all identified the knife that was found on Norris as the same knife he used to threaten them. Officer James and Officer Guest responded separately to a call for a disturbance with weapons, indicating the presence of a knife. Officer James saw Norris standing over Victim in an intimidating manner. The witnesses saw Norris walk from Victim to the porch across the street, where his co-defendant handed police the items from Victim's wallet a few minutes later. Accordingly, we find the evidence admitted at trial shows Norris's guilt was conclusively proven by competent evidence, such that the jury could reach no other rational conclusion.

Norris, No. 2023-UP-406 at 6.

As acknowledged by the PCR court, each of the above factors would have supported a guilty verdict. App. 508; 518 - 520. However, none of these factors equate to overwhelming evidence of guilt required to set aside the PCR court’s factual finding of prejudice. *See Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (finding for the evidence to be “overwhelming” such that it categorically precludes a finding of prejudice “the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.”).

Many of these facts have a counter view that supported Norris' innocence. Norris told Childs that individuals were on the roof of the church, and he got his cell phone so he could call police to report the apparent crime since it was suspicious for people to be climbing on the church roof at midnight. App. 241, l. 8 – 24. As to “taking” of the wallet at knifepoint, Norris indicated Bond was startled by his approach, and Bond took out the wallet and simply gave it to Norris in response to Norris' questioning Bond on the presence of so many people on the roof of a closed church, very late at night, in a questionable neighborhood. App. 268, l. 8 – 271, l. 20. Childs indicated he arrived shortly after the initial confrontation and was handed what he believed was identification cards for Bond which he held pending the arrival of police since he intended to call 911 and help detain the individuals until police arrived. App. 241, l. 8 – 242, l. 24.

Neither Childs nor Norris acted guilty of any crime when police arrived shortly after the initial encounter. They did not flee the area. App. 211, ll. 11 – 21; 271, l. 23 – 272, l. 14. They told the police about the people on the roof and their intention to hold them until the police arrived. App. 211, ll. 13 – 18. They consented to a search. App. 211, l. 22 – 213, l. 7. More importantly, both Norris and Childs denied the criminal intent element of the crime charged, with each testifying that their intention was to hold the individuals until police arrived, not to commit the offense of armed robbery. App. 241, l. 8 – 242, l. 24; 268, l. 8 – 271, l. 20. This version, if believed by the jury, would have negated the intent element of the crime.

The knife that was found on Norris during the consent search was shown immediately to Bond who identified it as the knife Norris allegedly used to threaten Bond. App. 213, ll. 3 – 12. While the knife and its existence certainly support Bond's version of events, it is also possible that the idea of a weapon being used was invented and the knife was a convenient circumstance.

There were, in fact, conflicting stories about the existence of a “weapon” which do support the invention conclusion. Blankenship testified of his desire to protect himself from “these guys that have knives or guns” and that some of his companions said Norris and Childs had guns. App. 159, ll. 14 – 22. The reporting officers indicated a belief a “weapon” was involved, though one also mentioned a possible knife or gun. App. 200, 6 – 22; 210, ll. 7 – 11.


The mere existence of the knife does not rise to the level of overwhelming evidence which would preclude a finding of prejudice. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). This Court should, therefore, defer to the finding of prejudice by the PCR court and allow a jury to determine which version of events was true, untainted by the improperly admitted criminal convictions and their prejudicial nature of the state’s use of those prior convictions.²

For the above-mentioned reasons, this Court may have overlooked or misapprehended the findings of fact by the PCR court and improperly substituted its view of the evidence for that of the PCR court. As determined by the PCR court, Norris was entitled to have the jury “fairly consider his version of events” uncolored by the prejudicial introduction of a similar criminal conviction. App. 508 (emphasis added). There should be a rehearing for these issues to be addressed once again and be considered by this Court.

²And you've *done robbery before*, haven't you, Mr. Norris? A Yes, sir. App. 283, ll. 16 – 18 (emphasis added).

CONCLUSION

For the reasons stated above, Norris petitions for rehearing pursuant to Rule 221(a) SCACR, and requests this Court reinstate the PCR court's order granting Norris a new trial.



Gary H. Johnson
Appellate Defender

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ATTORNEY FOR PETITIONER

This 4th day of January, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
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Appeal from Spartanburg County

Honorable Roger L. Couch, Circuit Court Judge

STATE OF SOUTH CAROLINA,

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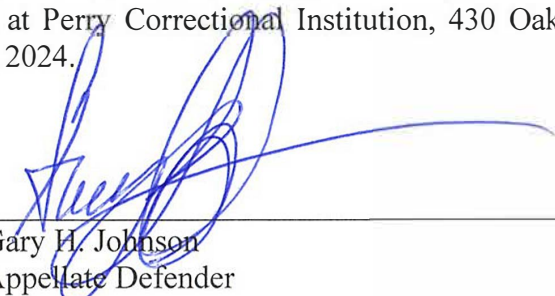
CARNIE NORRIS,

PETITIONER

APPELLATE CASE NO. 2019-000334

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Carnie Norris, #227226, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 4th day of January, 2024.



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ATTORNEY FOR PETITIONER

From: [Warren, Kaylynn](#)
To: [Josh Edwards](#)
Cc: [Johnson, Gary](#); [Anne Mueller](#)
Subject: 2019-000334 Carnie Norris v. The State
Date: Thursday, January 4, 2024 2:14:00 PM
Attachments: [2019-000334 Carnie Norris v. The State Petition for Rehearing and COS.pdf](#)

Good Afternoon,

Attached for service in the above-referenced case is the Petition for Rehearing which will be filed today, January 4, 2024, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren

Administrative Assistant
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