STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

Opinion No. 5209 (S.C. Ct. App. filed 3/19/2014)

10-GS-21-1008

THE STATE,

RESPONDENT,

V.

TYRONE WHATLEY,

PETITIONER

APPELLATE CASE NO. 2014-001127

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 25, 2014. App. 15.

QUESTION PRESENTED

Did the Court of Appeals err in concluding that Petitioner suffered no prejudice as a result circuit court's improper limitation on the scope of Petitioner's cross-examination of the state's witness, Jessica Ussery, regarding the mandatory minimum sentences she avoided by testifying against Petitioner?

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Petitioner on one count of burglary in the first degree, two counts of armed robbery, and one count of conspiracy. R. 253. On August 4, 2010, the state served Petitioner with its notice to seek life without parole based upon Petitioner's prior conviction for armed robbery. R. 247 lines 4-8. On February 2, 2011, the state, represented by Fitzlee H. McEachin, called the case for trial before the Honorable D. Craig Brown and a jury. R. 5 lines 6-8. Scott P. Floyd represented Petitioner. R. 1. The state presented testimony from the two victims, two co-defendants, and two police officers. The jury returned its verdict finding Petitioner guilty on all counts. R. 245 lines 4-12. Judge Brown sentenced Petitioner to life without parole on the burglary and armed robbery convictions and five years on the conspiracy conviction. R. 249 line 17 - R. 250 line 3. He ordered all sentences to run concurrently. R. 250 lines 4-5.

Petitioner filed a timely notice of appeal. On January 31, 2012, undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) addressing the following issue: Did the trial court err in refusing to permit Petitioner to question Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the state dismissed two counts of armed robbery after she cooperated with law enforcement? On September 7, 2012, undersigned counsel provided State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) as supplemental authority to the Court of Appeals. On December 20, 2012, the Court denied undersigned counsel's petition to be relieved and directed the parties to brief the issue: Did the circuit court improperly limit the scope of [Petitioner]'s cross-examination of the state's witness, Jessica Ussery, regarding the mandatory minimum sentences she avoided by testifying against [Petitioner]?

On March 19, 2014, the Court affirmed Petitioner's convictions for first-degree burglary, two counts of armed robbery, and conspiracy and life sentence in a published opinion. App. 1-9;

State v. Whatley, 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014). The Court found the trial court erred in preventing Petitioner from cross-examining a cooperating co-defendant concerning the mandatory minimum sentence she faced for reduced charges pending at the time of Petitioner's trial, but found Petitioner suffered no prejudice because he had ample opportunity to demonstrate the cooperating co-defendant's bias. App. 8-9. The opinion was authored by Acting Judge Cureton and Chief Judge Few concurred. Judge Pieper concurred in result only. App. 1; App. 9.

On April 3, 2014, Petitioner filed a petition for rehearing challenging the Court of Appeals' finding of no prejudice. Petitioner did not challenge the finding of error. App. 10-14. The state did not file a petition for rehearing. On April 25, 2014, the panel denied Petitioner's petition for rehearing. App. 15.

This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in concluding that Petitioner suffered no prejudice as a result circuit court's improper limitation on the scope of Petitioner's cross-examination of the state's witness, Jessica Ussery, regarding the mandatory minimum sentences she avoided by testifying against Petitioner.

Why this Court Should Grant Certiorari

Pursuant to Rule 242(b) of the South Carolina Appellate Court Rules, a writ of certiorari is not a matter of right and will be granted "only where there are special and important reasons." One of the characters of reasons enumerated is that the decision of the Court of Appeals is in conflict with a prior decision of this Court. Another character of reason enumerated is where substantial constitutional issues are directly involved. The decision by the Court of Appeals in Petitioner's case presents a conflict with prior decisions of this Court and directly involves substantial constitutional issues. Therefore, this Court should grant certiorari.

Relevant facts

The state's theory of the case was that Petitioner along with Jessica Ussery and John Barfield barged into the hotel room of Brandon Cross and Ciera Davis on July 21, 2009 and robbed them at gunpoint. R. 50 line 24 – R. 51 line 7. Police officers apprehended Ussery shortly after the robbery in a car containing items from the robbery. R. 96 line 21- R. 97 line 2; R. 98 lines 2-7. A police officer observed two individuals run from the vehicle, but was unable to apprehend or identify them. R. 94 lines 1-13. Shortly after her arrest, Ussery confessed to her role in the robbery. R. 125 lines 1-3. Although Ussery initially provided a false name for her co-conspirator and boyfriend to officers, she eventually named Barfield. R. 171 lines 13-20. Ussery knew the other individual only has Rom or Jamal Bryant. R. 116 lines 9-17. Almost a year after his arrest, Barfield

provided officers with a nickname – Rom - for the third individual involved and the general location of Rom's residence. R. 173 lines 13-19. Officers learned that Petitioner was a resident of the trailer in the location generally identified by Barfield. R. 173 line 24 – R. 174 line 1. Barfield then identified a photograph of Petitioner as the third co-conspirator. R. 174 lines 1-10.

Ussery testified on behalf of the state. R. 109 lines 9-11. She identified Petitioner as an individual involved in the robbery. R. 116 line 18 – R. 117 line 2. She was forced to admit that she had seen Petitioner only a few times and did not know him. R. 131 lines 6-9. When pressed, she admitted she had seen Petitioner "[m]aybe two or three times" and had no conversations with him. R. 131 lines 13-19. On cross examination, she testified she had been charged with two counts of armed robbery, failure to stop for a blue light, and false information to police. R. 130 lines 2-4. She also admitted that the armed robbery charges had been dismissed, and she was charged with accessory before and after the fact. R. 130 lines 13-17. Petitioner then questioned Ussery about the amount of time she could receive on the pending charges. R. 142 line 2. The state objected, R. 142 lines 3-5, and the judge sustained the objection with no explanation, R. 142 line 6. Petitioner then asked Ussery the possible sentence for her original charge of armed robbery. R. 142 lines 11-12. Ussery responded that she was not aware of the "full extent" but recognized it "carrie[d] a long sentence." R. 142 lines 13-14.

The state also called Barfield to testify against Petitioner. R. 143 lines 18-19. Barfield identified Petitioner in court. R 145 line 24 – R. 146 line 4. On cross-examination, Barfield admitted that he had been charged with two counts of armed robbery, burglary in the first degree, weapon possession and criminal conspiracy. R. 158 lines 21-22. Barfield testified that he pled guilty to two counts of attempted armed robbery and received a seven-year sentence. R. 159 lines 3-10. All other charges against him were dismissed. R. 159 lines 11-13. When Petitioner asked

Barfield how much time he was facing on the original charges, the state objected. R. 159 lines 18-21. The trial court sustained the objection. R. 160 line 1. The court permitted Petitioner to ask if Barfield could get substantially more time for armed robbery than for attempted armed robbery, R. 160 lines 6-11, and substantially more time for burglary in the first degree than for attempted armed robbery, R. 160 lines 12-14. After another witness testified for the state, the trial judge announced that he was changing his ruling. R. 184 line 10 – R. 185 line 5. He explained that his research revealed that Petitioner could question Barfield concerning the amount of time he was facing. R. 184 line 19-23. The judge ordered the state to recall Barfield and permitted Petitioner to question him. R. 184 line 24 – R. 185 line 5. When Barfield testified for the second time, he admitted that he was facing ten years to thirty years on armed robbery charges and fifteen years to life on burglary charges. R. 190 line 18 – R. 191 line 5.

Although the trial judge recognized his error in ruling the questions concerning potential sentences impermissible as to Barfield and allowed re-questioning of him, the trial judge did not permit Petitioner to re-question Ussery despite the same ruling having been made during cross-examination of her. As held by the Court of Appeals, the trial judge erred in restricting Petitioner's cross-examination of Ussery. However, the Court of Appeals' finding that Petitioner suffered no prejudice was erroneous.

Discussion

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). This guarantee

ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." To establish a violation of the Confrontation Clause, Petitioner must show that he was prohibited from asking questions designed to show bias on the part of Ussery. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

Petitioner's question to Ussery concerning the length of sentence she could receive on her pending charges and dismissed charges were appropriate questions. Numerous decisions of South Carolina's appellate courts hold that questions regarding sentences and potential sentencing are probative of witnesses' biases and prejudices. In light of the Court of Appeals' finding that the judge erred in restricting Petitioner's cross-examination of Ussery and the state did not challenge that ruling, Petitioner will not belabor the point except as necessary to provide context and demonstrate resulting prejudice.[1]

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[1] Ussery was charged with two counts of armed robbery and faced mandatory minimum sentences of ten years on each charge. See S.C. Code Ann. § 16-11-330(A). Concerning the charge of failure to stop for a blue light, Ussery faced a mandatory sentence of a fine not less than $500 or imprisonment for not less than ninety days. See S.C. Code Ann. 56-5-750(B)(1). The two counts of armed robbery were dismissed, but she testified that she was charged with one count of accessory before the fact of armed robbery and one count of accessory after the fact of armed robbery. Ussery faced a mandatory minimum of ten years on the charge of accessory before the fact of an armed robbery because South Carolina law provides that a person convicted of accessory before the fact of a felony "must be punished in the manner prescribed for the punishment of the principal felon." S.C. Code Ann. § 16-1-40. Concerning the second charge of accessory after the fact of an armed

In Graceley, 399 S.C. at 373-374, 731 S.E.2d at 885-886, this Court held the trial court erred in improperly limiting the scope of defense counsel's cross-examination of state's witnesses concerning the witnesses facing mandatory minimum sentences that were significantly longer than the sentences received in exchange for their cooperation. The prosecution made plea deals with multiple cooperating witnesses against Gracely. Those deals permitted the witnesses to avoid several mandatory minimum terms of imprisonment. Id. at 374, 731 S.E.2d at 885-886. The trial court permitted defense counsel to question the witnesses regarding the maximum sentences permissible for the charged offenses, but limited counsel's questioning regarding mandatory minimums. Id. at 374, 731 S.E.2d at 886. This limitation prevented counsel "from demonstrating the possible bias arising from the plea deals through an examination reaching the requisite degree of granularity." Id. This Court made clear "[t]he fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury." Id. at 374-375, 731 S.E.2d at 886 (emphasis in the original).

Additionally relevant to the instant matter, this Court noted that one witness admitted that the drug offense carried a mandatory minimum of twenty-five years' imprisonment, but explained that "[i]t is of no moment that at some point during the proceedings one of the witnesses confirmed the existence of a mandatory minimum sentence ... [because Gracely] was unable to fully develop this information through cross-examination." Id. at 375 n. 4, 731 S.E.2d at 886 n. 4.

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robbery, Ussery faced up to fifteen years. Punishment for accessory after the fact of an armed robbery is imprisonment not more than fifteen years. S.C. Code Ann. § 16-1-55 (providing that a person who commits the offense of accessory after the fact must be punished based upon the classification below the punishment provided for the principal offense, except for Class A, which requires a penalty as prescribed for a Class D felony); S.C. Code Ann. § 16-1- 90 (A)(robbery while armed with a deadly weapon is a Class A felony); S.C. Code Ann. § 16-1-20(A)(4)(punishment for a Class D felony is not more than fifteen years).

In the instant case, Ussery testified that although her charges had been changed or reduced, she had no negotiated plea or plea agreement with the state. The trial judge's refusal to permit Petitioner to ask Ussery about potential sentencing on her pending charges was clear error, as found by the Court of Appeals and not challenged by the state, because the question probed Ussery's bias, the primary tool of cross-examination. This was particularly egregious because the reduced charges of accessory after the fact of a felony permitted Ussery to avoid the mandatory minimum sentences of armed robbery.

The primary focus of this petition is on whether the trial court's error was harmless beyond a reasonable doubt because the Court of Appeals found error, but determined Petitioner did not suffer prejudice from the error. See Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Gillian, 360 S.C. at 454, 602 S.E.2d at 73; Mizzell, 349 S.C. at 333, 563 S.E.2d at 318; Graham, 314 S.C. at 385, 444 S.E.2d at 527. The Court of Appeals' determination that the limitation placed upon Petitioner's cross-examination of Ussery did not prevent a full picture of her possible bias was in error and in direct contradiction of this Court's holding in Gracely, supra. As the Court acknowledged, the only witnesses who placed Petitioner at the crime scene were cooperating co-defendants, one of whom was Ussery. Therefore, the testimony of Ussery was vital to the prosecution. However, the Court determined Petitioner suffered no harm due to the trial judge's erroneous limitation on cross-examination because Barfield, the other cooperating witness, provided the same material facts as Ussery. Thus, the Court determined it was cumulative to Barfield's testimony, and as a result, Petitioner was not harmed by the limitation to explore Ussery's bias. This was error.

Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684; see also Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Mizell, 349 S.C. at 333, 563 S.E.2d at 318-19.

In Gracely, 399 S.C. at 376-377, 731 S.E.2d at 887, this Court found the Confrontation Clause violation was not harmless even where the evidence presented was cumulative regarding Gracely's involving in drug trafficking. This Court explained that the testimony "only corroborated other testimony," and the prosecution presented no physical evidence connecting Gracely to the charged offenses. This "enhanced the importance of that testimony, and the necessity that [Gracely] be permitted to demonstrate any bias on the part of the State's witnesses." Id. at 376, 731 S.E.2d at 887. This Court also expressed that the background of the witnesses "should have cautioned the trial court against limiting [Gracely]'s cross examination." Id. at 377, 731 S.E.2d at 887. The witnesses in Gracely had significant involvement in criminal activity and cooperated only after arrest and the prospect of long prison terms. "In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless." Id.

This Court held a violation of the Confrontation Clause was not harmless even where the facts did not fall squarely within the Van Arsdall factors. Graham, 314 S.C. at 385, 444 S.E.2d at 527-528. The witness, Simmons, first invoked his Fifth Amendment right not to incriminate

himself where there was still a pending murder indictment against him despite his guilty plea to accessory to murder after the fact. Id. at 386, 444 S.E.2d at 528. The prosecutor claimed the plea agreement was valid only if the state called Simmons and Simmons testified truthfully, which the state defined as consistent with a prior statement that he was drunk and had no knowledge of the surrounding events. Id. at 386-387, 444 S.E.2d at 528. The prosecutor acknowledged he could not prevent Simmons from testifying, but continued to threaten further prosecution unless Simmons testified truthfully, as defined by the prosecutor. Id. Predictably, Simmons testified he was drunk and had no knowledge of the murder. Id. Graham then proffered the testimony of another witness who stated that Simmons informed the witness that he would have no further problems with the victim and that Simmons had killed the victim. Id. This Court stated that the prosecutor's attempted manipulation of Simmons' testimony and the witness' proffered testimony raised the question of the extent of Simmons' involvement in the murder. Id. This Court held the jury was entitled to know Simmons' sentence of only eight years as murder was a serious crime for which Graham, who was sixteen, received a life sentence and Simmons avoided the heavy penalty "for what may have been his silence." Id.

In Mizzell, this Court held the trial court's error in limiting cross-examination of a witness concerning potential sentencing was not harmless because the witness provided the only evidence of the defendants' participation in the crime. 349 S.C. at 334, 563 S.E.2d at 319. Although some of the testimony from the witness was cumulative, the witness provided the only evidence that the defendants were at the crime scene as there was no physical evidence implicating the defendants. Id.

Also, in State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991), this Court held a trial court's limitation on the defendant's cross examination of a state's witness was not harmless

error. The witness testified that in return for her testimony she was allowed to plead guilty to one count of conspiracy for which she could receive a maximum of seven and one-half years. Id. However, the defendant was prevented from asking the witness the punishment for trafficking cocaine, the original charge for the witness. Id. This Court noted that the witness faced a mandatory sentence of at least twenty-five years without parole for the trafficking cocaine charge. Id. This Court held the fact that the mandatory minimum was more than three times the duration she would face on her plea to conspiracy was critical evidence of potential bias. Id. Additionally, the witness's testimony was critical to the prosecution's case because she provided the only evidence of the defendant's knowing involvement in the drug deal. Id. at 171-172, 399 S.E.2d at 594.

On the other hand, in Sims, this Court held the error was harmless because the prosecution's case against the defendant was strong where the defendant's fingerprints were found at the scene, the victim's mother testified the defendant was angry with the victim, and the defendant confessed to two officers. 348 S.C. at 26, 558 S.E.2d at 523. Similarly, this Court held the error was harmless where the testimony provided by the two witnesses whose cross-examination was limited improperly was not the only evidence of the defendant's involvement in the murder. State v. Curry, 370 S.C. 674, 681, 636 S.E.2d 649, 652-653 (Ct. App. 2006). One of the victims unequivocally identified the defendant as the shooter, and a co-conspirator testified regarding the defendant's discussion about the murder weapon; thus, this Court concluded, the testimony of the two witnesses was cumulative to that given by others. Id. at 681-682, 636 S.E.2d at 653.

The prosecution presented Ussery as an unbiased witness who had been taken advantage of by her boyfriend, Barfield. She had been bullied and pressured by her boyfriend to participate in the robberies. She was simply the getaway driver with little to no responsibility for the crimes. As

such, her testimony was more than simply cumulative to Barfield's testimony. Further, as the Court acknowledged, the state's case against Petitioner was weak. No physical or forensic evidence linked Petitioner to the robbery. The victims were unable to identify Petitioner. The officer who chased the individuals from the car was unable to identify Petitioner. No items from the robbery were found with Petitioner. The only evidence against Petitioner was the testimony of Ussery and Barfield. Ussery testified that the third individual involved was named Jamal Bryant and used the nickname Rom. Barfield testified the third individual went by the name of Rom. The state introduced no evidence, except the in-court identifications made by Ussery and Barfield, that "Rom" and Petitioner were one in the same. Therefore, the credibility of Ussery and Barfield was paramount as their testimony was the entire prosecution case against Petitioner. Ussery's credibility was suspect, just as the cooperating co-defendants' in Gracely exhibited highly suspect credibility. Ussery had been charged and only decided to cooperate with police after she had been sitting in jail for a substantial amount of time and faced several substantial terms of imprisonment.

CONCLUSION

The Court of Appeals erred in finding the trial court's erroneous refusal to permit Petitioner to question Ussery, an alleged co-conspirator, regarding the mandatory minimum sentences for her pending charge and dismissed charge, where the state dismissed two counts of armed robbery after she cooperated with law enforcement was not prejudicial to Petitioner. Therefore, this Court should grant the petition for writ of certiorari and order full briefing on the issue.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 3rd day of June, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

D. Craig Brown, Circuit Court Judge

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10-GS-21-1008

THE STATE,

RESPONDENT,

V.

TYRONE WHATLEY,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Tyrone Whatley #208735, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899 and the S.C. Court of Appeals this 3rd day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of June, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022