STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER HELLER,

PETITIONER

BRIEF OF PETITIONER

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INDEX

INDEX 1

TABLE OF AUTHORITIES 2

ISSUE PRESENTED 3

STATEMENT OF THE FACTS

Procedural History 4
Relevant Trial Facts 4
Testimony of witness Nails 6
Tracy testifies 7
Mary Chavis 7

ARGUMENT

The Court of Appeals erred by holding that any error in allowing petitioner to be impeached with his prior drug convictions pursuant to Rule 609(a)(1), SCRE, was harmless since their unduly prejudicial effect was highlighted by the solicitor admitting the nature of the convictions made them relevant to whether the jury believed petitioner that the police were lying and coerced his statements since this impermissibly invited the jury to find petitioner was acting in character in this case with his past drug convictions, and invited a verdict on an improper basis 9

Relevant Facts 9
Discussion 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Green v State, 338 S.C. 428, 527 S.E.2d 98 (2000) 11

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) 11

State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) 11

State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000) 10, 12

State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (1992) 13

State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012) 13

State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (2012) 4

State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. 2001) 12

State v. Morris, 289 S.C. 294, 297-298, 345 S.E.2d 477, 479 (1986) 13, 14

State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) 11, 12

Rules

Rule 609 (a)(1), SCRE 9

Rule 609(a)(2), SCRE 11

Rule 609(b), SCRE 11

ISSUE PRESENTED

Whether the Court of Appeals erred by holding that any error in allowing petitioner to be impeached with his prior drug convictions pursuant to Rule 609(a)(1), SCRE, was harmless since their unduly prejudicial effect was highlighted by the solicitor admitting the nature of the convictions made them relevant to whether the jury believed petitioner that the police were lying and coerced his statements since this impermissibly invited the jury to find petitioner was acting in character in this case with his past drug convictions, and invited a verdict on an improper basis?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Richland County Grand Jury for the offenses of murder and assault and battery with intent to kill (ABIK). R. 906 – 909. His case was called to trial on January 26, 2009 before the Honorable J. C. Nicholson, and a jury. Gregory Collins represented petitioner. Margaret Fent and Dolly Justice Garfield were the assistant solicitors. R. 1.

At the conclusion of the trial the jury found petitioner guilty on both counts. R. 878, ll. 11-19. Judge Nicholson sentenced petitioner to life imprisonment for murder and twenty years imprisonment for assault and battery with intent to kill.

The Court of Appeals affirmed petitioner's convictions in State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (2012). App. 1-18. Petitioner sought rehearing. 19-22. Rehearing was denied. App. 23. The petition for writ of certiorari in the Court of Appeals was filed on November 26, 2012. The return to the petition for writ of certiorari was filed by the state on March 29, 2013. The order granting certiorari on Question Two was filed on May 23, 2014.

This Brief of Petitioner follows.

Relevant trial facts

Petitioner testified that the police arrested his mother in Georgia, apparently as an accessory after the fact to the murder for which he was a suspect in this state. Petitioner said the Richland County Police Department and the Georgia police told him that he could either "take these charges" or his mother would be prosecuted. R. 773, l. 20 - 777, l. 17.

Petitioner's mother was in jail at the time.[1] "I just couldn't stand the fact of seeing her sitting in a jail cell [and] she's never been in that situation before, so I knew there was nothing else for me to do but sign this paper that they presented to me." R. 773, l. 20 - 777, l. 17.

Petitioner testified that he never read the statement the police wrote for him in which he confessed to having stabbed the victims, Chino and Mary Chavis, in Richland County, South Carolina. R. 777, ll. 7-13. Petitioner denied admitting that he "just started stabbing people" inside the trailer that night while high on drugs. R. 800, l. 2- 801, l. 16.

Petitioner admitted other parts of the statement were true such as him having a small knife. However, petitioner was adamant that he never told the police that he stabbed anyone. R. 802, ll. 3-20.

Petitioner explained to the jurors that he came to South Carolina with his family. He went to the club with his cousin Kevin Nails on the night of January 25, 2006. After that Nails picked up "the white girl," Tracy Risinger, and they drove to a mobile home where petitioner had never been. Another man, Devon, was also present and Devon had sex with Tracy in the back room. Petitioner said they "smoked crack" that night. However, Tracy's roommate, Mary Chavis, told him that he should leave "so I left, no questions asked." Chavis and Tracy would later testify and admit they both had a major crack cocaine problem at the time. R. 767, l. 8 - 769, l. 24.

Petitioner said he attempted to call his cousin, Kevin Nails, from a pay phone "up the road." R. 770, ll. 1-6. However, petitioner was not able to reach him, and he therefore stayed in an abandoned trailer "until my high went down and ... [until] I was straight." R. 770. ll. 5-19.

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[1] Petitioner's mother testified the police came to her home in Georgia looking for petitioner, they searched her home, and took her to "headquarters" where she was placed in a "holding cell. She was told that she was going to be charged with "aiding and abetting." Mrs. Heller said she did not

Once petitioner was "straight," he was able to use a different telephone the next morning. This time he reached Nails who picked him up. Petitioner was then able to shower, and he returned to Georgia, apparently the next day. R. 770, l. 2- 774, l. 10.

The testimony of witness Nails

Nails testified that he drove petitioner to the mobile home that night. Once there Nails, petitioner, Devon, Mary Chavis and a Hispanic man smoked marijuana and crack cocaine together. R. 421, ll. 10-21.

Nails wanted to leave the mobile home at some point to go to the club. However, he recalled petitioner wanted to stay and see if he also could have sex with Tracy. Nails said he returned to the trailer after going back to the club and he blew the horn so petitioner would come outside. When no one came outside the trailer Nails drove away. R. 422, l. 15 - 426, 25.

Nails recalled as he drove away he spotted Tracy running towards his car. Nails remembered that Tracy told him: "Your boy, your boy snapped." Nails asked Tracy where petitioner was and she answered "I don't know. He left." R. 426, ll. 2-5.

Tracy testifies

Tracy testified that after Chavis told petitioner to leave, he left, but a man returned and knocked on the door. She claimed that she could identify the man's voice that knocked on the door and spoke through the door. Over petitioner's objection, Tracy testified: "*I would say him.*" She meant petitioner. Tracy said she told Chavis not to open the door but that Chavis opened the door anyway. R. 383, ll. 3-25. (emphasis added).

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know if she was ever charged but she never heard from the authorities again after she was released. R. 755, l. 9 – 762, l. 20.

Tracy maintained that she went into the bedroom and hid under the bed. She did not see the man that entered the trailer. However, she heard "a lot of banging and screaming" from under the bed. When finally came out she found Chavis had been badly injured, stabbed. R. 384 l. 1- 386 l. 8.

While Chavis was stabbed inside the mobile home her friend Chino was found lying dead outside the mobile home. Tracy said she flagged down Nails and told him: "Your cousin had went crazy, and he was trying to kill everyone." R. 388, ll. 6-25.

Mary Chavis

Mary Chavis said that she had told petitioner to leave the mobile home she shared with Tracy, and that petitioner left with Chino. R. 459, l. 1 – 460, l. 11. Chavis maintained that petitioner returned later, and tried to come back in the trailer. " I put my hand out and put it on his chest and asked him, 'What is the problem? What's up?''' Chavis said petitioner said "something" and started stabbing her. R. 461, l. 8 - 464, l. 3. Chavis remembered that she fought with petitioner and that she was badly injured. She saw "Chino run out the door and the defendant ran behind him." R. 464, ll. 5-8.

As seen, Tracy Risinger had testified that Mary Chavis asked petitioner to leave on the night in question. She said petitioner "gave me the creeps because I had tried to leave right before that, and he tried to follow me out." R. 379, ll. 12-21.

Risinger said there was a knock on the door three to five minutes later and she "heard his voice." At this point defense asked to approach stating *"she is making an I.D. on a voice that has never come up before*." Defense counsel Collins noted that this alleged voice identification had never been brought up pre-trial or addressed by the court. Defense counsel moved to strike Risinger's apparent voice identification and a bench conference was held. R. 380, l. 18- 381, l. 16. The judge then sustained the objection.

When the solicitor *continued to attempt* to place this voice identification evidence before the jury -- despite the judge's earlier ruling -- *defense counsel again objected.* This time the objection, however, was overruled and the solicitor's question "Who was that voice belonging to?" was answered by Risinger: "*I would say him*" -- meaning petitioner -- "*without a doubt.*"[2] R. 383, ll. 12-23. (emphasis added).

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[2] Certiorari was denied on this voice identification issue.

ARGUMENT

The Court of Appeals erred by holding that any error in allowing petitioner to be impeached with his prior drug convictions pursuant to Rule 609(a)(1), SCRE, was harmless since their unduly prejudicial effect was highlighted by the solicitor admitting the nature of the convictions made them relevant to whether the jury believed petitioner that the police were lying and coerced his statements since this impermissibly invited the jury to find petitioner was acting in character in this case with his past drug convictions, and invited a verdict on an improper basis.

Relevant Facts

Prior to petitioner's testimony the solicitor said she wanted to impeach petitioner with various drug convictions for manufacturing, selling, and dispensing drugs and possession of drugs with intent to distribute, and possession of drugs. R. 750, l. 2- 751, l. 9.

Defense counsel Collins argued petitioner's drug convictions should not be allowed as impeachment evidence pursuant to Rule 609 (a)(1), SCRE. Defense counsel argued the probative value of these drug convictions was far outweighed by their unduly prejudicial effect. Counsel told the court the solicitor wanted the jury to consider these as "propensity evidence to say that he's a drug dealer." R. 751, ll. 12-21.

The solicitor *agreed she was trying to use petitioner's prior record of being a drug dealer because petitioner said police were lying and coerced his confessions. The solicitor argued that made the drug convictions admissible "so the jury can know this and weigh his credibility versus the other witnesses who have testified.*" R. 751, l. 23- 752, l. 22. (emphasis added).

Defense counsel responded that the solicitor's reasoning proved his point. "Her argument just supported propensity evidence as the reason they're trying to introduce it, not whether he's

honest or dishonest . . . She is saying, `He is a criminal. He has a record; therefore, you can't believe him. That's exactly why it's not admissible.'" R. 752, l. 24- 753, l. 8.

The judge denied the motion to exclude these prior drug convictions and petitioner was subsequently impeached with these drug convictions.[3] The drug crimes impeachment included two counts of "manufacturing, selling, dispensing, distributing with intent to distribute . . . [and] drug trafficking within 1,000 feet of a park, recreation facility, or public housing," R. 767, ll. 16-18; R. 815, l. 24- 816, l. 18. The Court of Appeals noted the trial judge summarily denied petitioner's motion to exclude these prior crimes being used to impeach him. The Court wrote that petitioner argued the solicitor's own words proved the state wanted to use the convictions for an improper reason – to show petitioner was a drug dealer – the *type of person* who would accuse the police of lying ("so the jury would believe he was acting consistently wit his past character at time of the incident."). App. 10.

The Court of Appeals held that although the trial judge did not conduct a State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000) analysis that the error was harmless. App. 10-11. The Court then listed what it considered as "overwhelming evidence" of petitioner's guilt. It was the highly questionable testimony of admitted drug addicts, and also involved the voice identification of Risinger. App. 12.

[3] Defense counsel did argue the Rule 403, SCRE, "probative value is substantially outweighed by the danger of unfair prejudice" standard. Rule 609(1), SCRE does provide impeachment evidence for a crime not involving dishonesty is admissible if the "**court determines** that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The salient point is that the trial court did not weigh the probative value of this evidence against its prejudicial effect **at all.** As argued infra that failure to weigh the probative value of the evidence against its prejudicial effect in and of itself was an abuse of discretion, and it is, respectfully,

Discussion

Rule 609(a)(1), SCRE allows a defendant to be impeached with a crime that is punishable by a sentence in excess of one year in prison if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. Conversely, convictions or crimes of dishonesty or false statement are automatically admissible as impeachment evidence under Rule 609(a)(2), SCRE. These are all subject to the time limitations of Rule 609(b), SCRE which are not an issue here.

Violations of narcotics or drug laws are generally not probative of truthfulness. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). The fact that one uses drugs or sells drugs is not probative of his honesty. See, also, State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Green v State, 338 S.C. 428, 527 S.E.2d 98 (2000). Both Bryant and Aleksey were murder cases, and not drug cases. That did not change the fact that drug crimes impeachment is generally improper because drug crimes are not probative of veracity for whatever crime the testifying defendant is on trial for in a particular case. The impeachment with drug dealing and drug offenses is nonetheless prejudicial.

Here, defense counsel correctly argued that the solicitor desired to impeach petitioner with these drug crimes so the jury would believe petitioner was acting consistently at the time of the incident with his past character. The solicitor maintained that since petitioner alleged that the police were lying and that his statements to them were coerced that the jury should considered his past drug convictions in conjunction with the disputed evidence in this case.

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farcical to suggest the difference in the standard controlled the judge's ruling. See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

This is an interesting case since the solicitor **agreed** this was indeed why she wanted the jury to consider petitioner's prior drug convictions. However, it is fundamental that it is improper to admit prior criminal convictions as impeachment evidence to show the defendant was acting in conformity with his prior record when he allegedly committed the crime in question. It is equally improper to allow drug crimes impeachment evidence because the defendant alleged the police coerced his confession, and to assert that he is not worthy of belief because he has a criminal record consisting of drug offenses.

The solicitor's admission of why she wanted the impeachment evidence before the jury respectfully should have been a clear signal to the trial judge that the impeachment evidence should have been excluded. And the error was compounded because the judge ruled summarily and failed to conduct a State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000)[4] analysis. The state's assertion that the judge did not abuse his discretion in admitting this drug crimes impeachment evidence necessarily fails since "it is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise discretionary authority improperly." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

Further, v*oir dire* has taught the bench and bar that there are some jurors cannot be impartial if drugs are involved in a case. It is simply a barrier some jurors cannot get beyond. The failure to conduct a State v. Colf analysis should mandate a remand at a minimum.

The Court of Appeals was correct to the extent it found petitioner being impeached with these crimes was error. However, the finding of the Court of Appeals that the error was harmless

[4] In State v. Martin, 347 S.C. 522, 530, 556 S.E.2d 706, 710 (Ct. 2001), the Court noted that the Colf weighing analysis for remote convictions should also be conducted under Rule 609 (a)(1), SCRE for non-remote convictions. The trial court should articulate the specifics of its weighing analysis that led to its ruling.

was based on a "watered down" harmless error analysis involving the testimony of witnesses who were drug addicts and high on drugs on the night of the murders.

It was ultimately a jury question whether the jury believed the petitioner's statements were coerced to save his mother from being charged in this case. The threat that his mother could also be arrested if he did not "cooperate" was certainly not far-fetched. See State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (1992) (informing the defendant that his wife could also be arrested, and their children taken by D.S.S. was an exertion of improper influence rendering the defendant's statement involuntary).

It was clear error to impermissibly invite the jury to convict petitioner based upon him allegedly acting consistently with his prior criminal record and "bad character." The question should be whether there is any reasonable probability that the wrongly admitted impeachment evidence influenced the jury's verdict. State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012). Here the solicitor admitted an improper motive for the impeachment evidence, and it cannot be said with any confidence that her strategy was not successful. The solicitor wanted the jury to conclude petitioner was a drug dealer and his assertion that the police were lying and coerced his confession was therefore not worthy of belief, or, even if it was credible that they should not care because he was a criminal and a bad person.

Harmless error "is a doctrine which should be employed guardedly . . . and on a case by case basis." State v. Morris, 289 S.C. 294, 297-298, 345 S.E.2d 477, 479 (1986). Here, as seen, petitioner's mother testified the police came to her home in Georgia looking for petitioner, they searched her home, and took her to "headquarters" where she was placed in a "holding cell. R. 755, l. 9 – 762, l. 20. Petitioner testified he could not "stand the fact of seeing her sitting in a jail cell [and] that she's never been in that situation before . . . " Petitioner said he "took the charges" so his

mother would not suffer, and so she would be released. R. 774, l. 11 – 783, l. 13. Petitioner's credibility was of paramount importance in this case, and this error was not harmless beyond a reasonable doubt. State v. Morris, 289 S.C. 294, 297-298, 345 S.E.2d 477, 479 (1986).

CONCLUSION

By reason of the foregoing argument the decision of the Court of Appeals should be reversed, and petitioner should be granted a new trial.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of June, 2014

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J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

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CHRISTOPHER HELLER,

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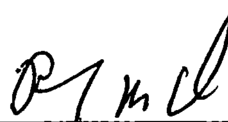
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on J. Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of June, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

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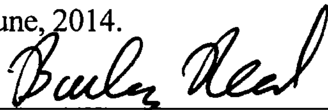

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