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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-122 (Ct. App. Filed March 19, 2014)
Appellate Case No. 2014-001126

AYREE HENDERSON,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioner certifies that the Petition for Rehearing was made and ruled on by the Court of Appeals on April 24, 2014.

ISSUE PRESENTED

- I. **The Court of Appeals erred in affirming the post-conviction relief court's incorrect ruling that Counsel was ineffective for failing to object to the State's impeachment of Respondent with his prior conviction of accessory after the fact to murder, where Counsel was not deficient because accessory after the fact is a crime of dishonesty under Rule 602(a)(2), SCRE, and Respondent was not prejudiced by Counsel's alleged deficiency.**

STATEMENT OF THE CASE

Ayree Henderson (hereinafter "Respondent") was indicted during the November 2002 term of the Richland County Grand Jury for Murder (2002-GS-40-07277). Charlie J. Johnson, Jr., Esquire (hereinafter "Counsel") represented Respondent. On September 21-24, 2004, Respondent proceeded to trial before the Honorable Alison R. Lee and a jury, where he was convicted as indicted. Judge Lee sentenced Respondent to thirty years imprisonment.

A notice of appeal was filed and an appeal was perfected. Following the submission of an Anders¹ brief on Respondent's behalf and Respondent's *pro se* brief, the South Carolina Court of Appeals dismissed the appeal. State v. Henderson, Op. No. 2008-UP-107 (Ct. App. filed February 12, 2008). The Remittitur was issued on February 28, 2008.

Respondent filed an application for post-conviction relief on March 4, 2008. Petitioner made its Return on January 30, 2009, requesting an evidentiary hearing be held. An evidentiary hearing was convened on August 12, 2009, before the Honorable G. Thomas Cooper, Jr. Respondent was present and represented by Charles T. Brooks, III, Esquire. Assistant Attorney General Brian T. Petrano appeared on behalf of Petitioner. At the court's request, both parties submitted proposed Orders. By Order signed July 12, 2010 and filed July 14, 2010, Judge Cooper granted Respondent post-conviction relief and ordered that Respondent receive a new trial.

Petitioner timely filed and served a notice of appeal on July 20, 2010. Petitioner submitted its Petition for Writ of Certiorari on September 30, 2010. Respondent submitted his Return to the Petition for Writ of Certiorari on February 22, 2010. The Petition was granted by Order of the South Carolina Court of Appeals dated January 17, 2013. After

full briefing and oral argument, the South Carolina Court of Appeals affirmed the Order of the post-conviction court granting post-conviction relief. Ayree Henderson v. State of South Carolina, Opinion No. 2014-UP-122 (Ct. App. Filed March 19, 2014). Petitioner subsequently filed a Petition for Rehearing on April 2, 2014. The South Carolina Court of Appeals denied rehearing by Order dated April 24, 2014. This Petition for Writ of Certiorari follows.

¹ Anders v. California, 386 U.S. 738 (1967).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). If the post-conviction relief court's conclusions of law are erroneous, it should be reversed. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007) (holding that this Court shall reverse the decision of a post-conviction relief court when it is controlled by an error of law).

When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, supra. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. The applicant must overcome this presumption in order to receive relief. Cherry, supra.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

- I. **The Court of Appeals erred in affirming the post-conviction relief court's incorrect ruling that Counsel was ineffective for failing to object to the State's impeachment of Respondent with his prior conviction of accessory after the fact to murder, where Counsel was not deficient for failing to object because accessory after the fact is a crime of dishonesty or false statement for the purposes of a Rule 609(a)(2), SCRE, analysis, and Respondent was not prejudiced by Counsel's alleged error.**

The Court of Appeals erred in affirming the post-conviction relief court's finding of ineffective assistance of counsel for failing to object to the State's impeachment of Respondent with his prior conviction of accessory after the fact to murder. In its Order of Dismissal, the post-conviction relief court found that Counsel was ineffective for failing to object to the introduction of Respondent's prior conviction for accessory after the fact to murder for impeachment purposes. App. p. 779-780. In support of this ruling, the post-conviction relief court determined that "[a]ccessory after the fact of murder is not a recognized impeachable offense for dishonesty" and therefore, not available for impeachment purposes pursuant to Rule 609(a)(2), SCRE. This ruling is controlled by an erroneous conclusion of law and warrants reversal. See Suber, supra.

Furthermore, the post-conviction relief court found that Respondent was prejudiced by Counsel's failure to object, as the conviction would not have been admissible under Rule 602(a)(1), SCRE. The post-conviction relief court elaborated that the prior conviction would not have been admissible for impeachment purposes under the balancing test as required under Rule 602(a)(2), SCRE, as the conviction would have been more prejudicial than probative. This ruling also constitutes an error of law requiring reversal.

A. Counsel was not deficient for failing to object to the State's impeachment of Respondent, as accessory after the fact to murder is a crime of dishonesty or false statement for the purposes of a Rule 609(a)(2), SCRE, analysis.

Rule 609(a)(2), SCRE, provides that a witness's character for truthfulness may be attacked "by evidence of a criminal conviction for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." Such convictions may be used to impeach a defendant witness who elects to take the stand in his defense. This Court has held that violations of narcotics laws are generally not probative of truthfulness. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 S.C. (2001) (citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)). Furthermore, this Court has determined that a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155-56 (2006) (citing United States v. Smith, 181 F.Supp.2d 904 (N.D.Ill.2002)). In Bryant, this Court stated that "[l]ikewise, firearms violations also are not generally probative of truthfulness" and determined that the lower court should have weighed the probative value of impeachment against the prejudicial effect prior to the admission of the firearms violation pursuant to Rule 609(a)(1), SCRE. Bryant, 369 S.C. at 517, 633 S.E.2d at 155-56.

South Carolina case law is silent as to whether accessory after the fact is an impeachable offense for dishonesty or false statement for the purposes of Rule 609(a)(2), SCRE. The post-conviction relief court acknowledged this in its Order granting relief. App. p. 780. However, as also noted by the post-conviction relief court, South Carolina has a broader definition of crimes of dishonesty than the federal courts. App. p. 780. See State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). The post-conviction

relief court went on to conclude that “[n]ot all accessory after the fact crimes involve dishonesty (i.e. failure to report out of fear, unwilling participation, compelled participation, a plea to a lesser offense for less culpable defendants, etc.)” App. p. 780. This is an error of law and requires reversal.

In State v. Legette, this Court concluded that the following elements must exist before an accused may be found guilty of accessory after the fact of a felony: “(1) the felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon.” State v. Legette, 285 S.C. 465, 466-67, 330 S.E.2d 293, 294 (1985) (citing State v. Hodge, 278 S.C. 110, 292 S.E.2d 600 (1982), cert. denied, 459 U.S. 910 (1982) and State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981)). “*The assistance or harboring rendered must be for the purpose of enabling the principal felon to escape detection or arrest.*” Id. (emphasis added) (citing State v. Nicholson, 221 S.C. 399, 70 S.E.2d 632 (1952))

Therefore, the only logical conclusion is that accessory after the fact is an act of deception. Respondent’s accessory after the fact conviction is a crime of dishonesty or false statement for purposes of a Rule 609(a)(2), SCRE, analysis. The intent for accessory after the fact is to enable the principal felon to escape detection, i.e. deception. As the principal purpose of accessory after the fact is to evade public justice and/or to actively suppress evidence, there exists an “obvious bearing on a defendant’s credibility.” State v. Nicholson, 221 S.C. 399, 70 S.E.2d 632 (1952).

The post-conviction relief court improperly analyzed the facts surrounding his prior conviction for accessory after the fact and concluded that the prior charge was not one of dishonesty because Respondent was in fear for his life. App. p. 780. The nature of the crime is not material to the analysis and the post-conviction relief court erred as a

matter of law. Even if it were, Respondent is not aided by further inquiry into the facts. If Respondent had any fear of reprisal in being honest with law enforcement about what he knew, it did not rise to the level of a valid defense, and in his own words was “not justifiable.” App. p. 466, line 11. Additionally, Respondent voluntarily elected to waive any affirmative defenses, such as necessity, when he pled guilty to accessory after the fact.² Further, generalized fear of reprisal for honesty with law enforcement about what he knew is strongly indicative of his dishonesty in the present situation.

Therefore, Respondent’s prior conviction for accessory after the fact was properly admitted for impeachment purposes pursuant to Rule 602(a)(2), SCRE. Counsel was not deficient for failing to object, as such an objection would have not been granted as the offense was an impeachable one based on Rule 602(a)(2), SCRE. The post-conviction relief court erred in its findings and this Court should reverse.

B. Respondent failed to carry his burden of demonstrating prejudice from Counsel’s alleged error.

While a finding of prejudice would only be necessary if counsel’s performance was deficient, evidence in the present case does not support a finding of prejudice resulting from Counsel’s alleged deficiency. Had Counsel objected to the prior accessory after the fact conviction being used for impeachment purposed pursuant to Rule 609(a)(2), SCRE, the offense would still have been admissible under Rule 602(a)(2), SCRE. There is no reasonable likelihood that the result of Respondent’s trial would have been different absent Counsel’s failure to object. See Cherry, supra. The post-conviction relief court erred in finding that Respondent was prejudiced and this Court should reverse.

² The defense of necessity is an affirmative defense and must be established by the preponderance of the evidence. State v. W.M.S., 320 S.C. 403, 408, 465 S.E.2d 580, 583, (Ct. App. 1995).

The post-conviction relief court determined that “[b]ecause [Respondent]’s prior conviction could not be automatically admitted as a crime of dishonesty, the trial judge was required to conduct a balancing test of Rule 609(a)(1) [SCRE].” App. p. 780. The court went on to conclude that such a balancing test would have required the prior conviction to be excluded, as it was more prejudicial than probative. App. p. 781. In support of this conclusion, the lower court cites “a lack of direct evidence in the State’s case against [Respondent]” and that Respondent claimed self-defense at trial. App. p. 781. However, this conclusion is incorrect.

“According to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when ‘the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.’” State v. Howard, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009). This Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). “The following factors, along with any other relevant factors, should be considered by the trial court: (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; and (5) the centrality of the credibility issue.” Howard, 384 S.C. at 221, 682 S.E.2d at 47 (citing Colf, supra).

An application of the Colf factors to the present case clearly weighs in the favor of the admission of Respondent’s prior conviction. First, the crime of accessory after the fact has a high impeachment value as it shows a willingness to impede the administration

of justice. "An accessory after the fact is not an accomplice. . . but is guilty of a separate substantive offense in the nature of an obstruction of justice." 22 C.J.S. Criminal Law §179 (2010). Second, the crime was clearly within the ten year window prescribed by Rule 609(b), SCRE. Third, accessory after the fact is a three-element crime that has nothing in common with murder, the offense for which Respondent was on trial. Accordingly, the admitted conviction passes the third prong of the Colf test, because the offenses are entirely dissimilar, and proof that Respondent is guilty of the former does not lead to an improper presumption that he would be guilty of the latter.

Lastly, the Respondent's testimony and credibility were central in the case because all of the witnesses, beyond other than Respondent and one less than credible witness, indicated that Respondent attacked and killed victim without provocation. Further, the stories told by Respondent and his witness were in direct contradiction of the evidence and testimony submitted by the State but would have indicated self-defense. Accordingly, Respondent's testimony and questions of Respondent's credibility are incredibly important in this context and would have led to the charge being admitted, fulfilling the final two factors of Colf.

Therefore, Respondent suffered no prejudice from Trial Counsel's failure to object to the admission of Respondent's prior conviction for accessory after the fact, as a balancing test pursuant to Rule 609(a)(1), SCRE, would have resulted in admission of the prior conviction.

Furthermore, the post-conviction relief court's conclusion that Respondent would not have been convicted absent impeachment with his prior offense due to a lack of direct evidence is incorrect and a mischaracterization of the record. The State presented direct evidence in the form of testimony from several witnesses that another person present at

the back door of victim's home shot and killed victim without provocation, although none of the witnesses were able to identify the second person. App. pp. 130-135; 190-193. The State also presented direct evidence in the form of witness testimony, that Respondent had announced that "he was going to rob [someone] tonight." App. p. 203, line 23. Further, direct evidence was presented to show that the victim did not own a gun at the time of the incident. App. p. 167, lines 3-19. Respondent admitted to being that other person, though his version of the facts was that he had not brought a gun or started the conflict but rather that he had been attacked by the victim. Respondent's version was that after the victim had entered the house, put on pants, and re-exited, that the gun had accidentally discharged in the scuffle. All the other evidence presented purely contradicted the story told by Respondent, making it unlikely that Respondent would have been believed and acquitted had Respondent's prior conviction for accessory after the fact not been admitted. As no probative evidence exists to prove that but for Counsel's alleged deficiency, the result of the trial would have been different, the post-conviction relief court should be reversed.

Because Respondent has failed to carry his burden of demonstrating prejudice such that the outcome of the proceeding would have been different, the Court of Appeals erred in affirming the post-conviction relief court's finding that Counsel was ineffective in regards to this allegation.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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July 28, 2014

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Certiorari to Richland County
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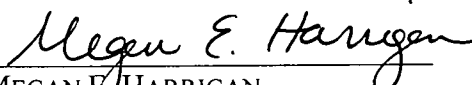
PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 28th day of July, 2014.


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