STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-122 (S.C. Ct. App. filed March 19, 2014)

APPELLATE CASE NO. 2014-001126

AYREE HENDERSON,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTION PRESENTED

The Court of Appeals correctly held that the respondent's prior conviction of accessory after the fact to murder was not an impeachable offense under Rule 602(a)(2), SCRE, since this prior was not a crime of dishonesty because the determinative factor was not whether a prior crime was a bad or heinous offense that was committed, but rather an analysis of the nature of the prior crime beyond the actual offense itself must be examined in order to assess whether the prior crime would reveal the witness' proclivity to lie or give untruthful testimony at trial and the possibility of prejudice that might arise thereafter.

STATEMENT OF THE CASE

The respondent adopts the statement of the case set forth by the petitioner in the petition for Writ of Certiorari filed with this Court on July 28, 2014.

ARGUMENT

The Court of Appeals correctly held that the respondent's prior conviction of accessory after the fact to murder was not an impeachable offense under Rule 602(a)(2), SCRE, since this prior was not a crime of dishonesty because the determinative factor was not whether a prior crime was a bad or heinous offense that was committed, but rather an analysis of the nature of the prior crime beyond the actual offense itself must be examined in order to assess whether the prior crime would reveal the witness' proclivity to lie or give untruthful testimony at trial and the possibility of prejudice that might arise thereafter.

FACTUAL SUMMARY

At trial, Terrell Myers testified that she and her live-in boyfriend Alonzo Gale were sleeping on the morning of August 3, 2002, when she woke to the sound of a tapping noise at the door of the apartment in which they resided. Myers stated that when she saw the respondent outside, Gale went out to investigate. Myers stated that she heard the two arguing and then heard gunfire. Myers added that when she rushed to open the door she found Gale bleeding. App. 139, l. 24 – p. 168, l. 18. Myers made an in-court identification of the respondent as the shooter, and prior to trial she made a pre-trial photo layout identification of the respondent as the perpetrator as well. App. 168, l. 23 – p. 169, l. 25; App. 353 l. 13 – p. 354, l. 25. Neighbors Everett Wilson, Kathy Wilson, and Dianne Crawford also heard gunfire sounds coming from the direction of Meyers' and Gale's apartment on the morning in question. App. 182, l. 6 – p.197, l. 10; App. 119, l. 18 – p. 137, l. 9; App. 198, l. 1 – p. 212, l. 22. Police Officer Robert Hill testified that he was dispatched to the crimes scene at 6:21 am on August 3, 2002, and arrived at there at 6:22 am, and added that Gale died shortly after his arrival. App. 82, l. 11 – p. 113, l. 1. Gale died from a gunshot wound to his "right" neck. App. 289, l. 3 – p. 295, l. 16.

The respondent's defense at trial was self-defense. The gun Alonzo Gale's held in his possession during this incident discharged as he (Gale) and the respondent fought on the morning in question. Eyewitness Shea Thomas testified that she and the respondent went to Gale's apartment around 5:30 am on August 3, 2002, to buy marijuana from Gale. Thomas stated that when they knocked on the apartment door, Gale opened the door while holding a gun and warned them not to come to his residence at such an early hour. Then, Gale went back inside, but returned back outside still fussing regarding his early wakening and said that he had something for the respondent. Thereafter, Gale and the respondent started to argue, and then began tussling. Minutes later, the gun Gale held fatally struck him (Gale). App. 388, l. 1 – p. 405, l. 25.

The respondent testified that he and Thomas started to leave after Gale fussed and appeared with a gun after they knocked on his door on the morning in question, but that Gale appeared again holding a gun and continuing to fuss and curse at them. App. 471, l. 12 – p. 472, l. 20. The respondent described the shooting as follows:

> Defendant: [Gale said] ... Man what you doing at my door this time of night, huh? What the f---you doing at my door ....I told you about coming to my door this time of night, like that. So...[Gale] went in the door, he went inside. so he went in the house, so I started walking off, me and Shea started walking off, but then when I got around the corner of the building, that's when [Gale] met me with the gun. App. 472, l. 20- p. 473, l. 3 App. 473, l.20; App. 474, l. 6 - 10
>
> Counsel: So [Gale] pointed [the gun] at you?
>
> Defendant: Yes, sir.
>
> Counsel: And then what did you do?
>
> Defendant: I grabbed like this (indicating).
>
> Counsel: And y'all started tussling?
>
> Defendant: Yes, sir.

Defendant: When we started tussling with the gun, I mean, it was – I can't give you no time frame on that because it all happened at a blur, but I know when I grabbed that gun, all I can think about was, damn, you know. All I was thinking about was I either get this gun or [Gale] going to kill me with it because I was scared. So when we started tussling with the gun, all I heard – I heard a shot. And when the gun shot – when the gun shot went off, I seen him fall. And when I seen [Gale] fall, I just... – mean, I'm in a drug neighborhood, me and somebody just got in a tussle with a gun, the gun went off. I seen him fall. I seen blood come out his mouth. I ran.
App. 482, l. 2 – p. 478, l. 12.

A crime scene investigator found no evidence inconsistent with self-defense. App. 268, l. 25 – App. 269, l. 5. Before the respondent testified, the trial judge advised him that if he decided to testify then his criminal record might be used against him. App. 381, ll. 15-20. The trial judge then gave the respondent a chance to confer with trial counsel before deciding to testify. After this break, trial counsel and the solicitor informed the trial judge that they had come to an agreement regarding respondent's criminal record. App. 383, ll. 8-21. During the direct examination of the respondent, trial counsel questioned him about a prior conviction for accessory after the fact to murder[1]. App. 465, l. 7 – p. 467, l. 24. The respondent informed the jury that he knew about the murder but was afraid to tell police because it might put his life in jeopardy. App. 466, ll. 1-15. The solicitor then cross-examined the respondent regarding the conviction. App. 847, ll. 12-18; p. 489, ll. 3-7.

During the respondent's PCR hearing, he testified that he believed trial counsel was ineffective in failing to object to the introduction of the accessory after the fact to murder conviction at a trial where he was being tried on a murder charge. App. 716, l. 4 – p. 721, l. 19; App. 727, ll. 4-7. Trial counsel testified that he saw no reason to object to the accessory after the fact charge explaining "it was a felony...within a ten year period." App. 751, ll. 14-18.

[1] It is unclear whether the prior charge was accessory after the fact to involuntary manslaughter or Murder. The PCR courts order refers to it as accessory after the fact to Murder.

The PCR Court granted relief by finding that trial counsel was ineffective in failing to object to the admission of the respondent's prior crime of accessory after the fact to murder conviction into evidence at a trial where he (the respondent) was being tried on a murder charge because the prior was not an impeachable crime of dishonesty under Rule 609, and also because the prejudicial value of the prior outweighed any probative value to the extent that the prior involved murder and the crime for which the respondent was on trial involved murder. Certainly, this misled the jurors to believe that the respondent possessed a criminal propensity to involve himself in murder situations and that he surely acted in conformity therewith in the instant case and was probably guilty of the murder charge for which he was on trial. App. 780 – 781.

THE WITNESS' OATH

The oath or affirmation that a witness takes upon taking the stand is fundamental to give the witness' testimony binding force, and it also works to impress upon the actual witness' conscience the necessity for speaking the truth to the extent that if a falsehood is spoken, then the sting of conscience would be felt and suffered. State v. Perez, 334 S.C. 563, 514 S.E. 2d 754 (1999); State v. Green, 267 S.C 599, 230 S.E. 2d. 618 (1076); United States v. Looper, 419 F. 2d 1405 (4th. Cir. 1969). In other words, the significance of the oath is to determine whether the witness understands that he must tell the truth. State v. Green, supra.

Hence, the impetus behind the oath is to assure the truthfulness of the testimony of a witness. Thus, if the honest testimony of a witness is the goal, then the goal of impeachment is to air prior crimes that show if a witness may lie or tell untruths, i.e., be dishonest. Therefore, an examination of which prior crimes qualify for impeachment purposes must move beyond whether the offenses were bad or wrong and into the realm of whether the prior crimes by nature contain an element of deceitfulness and dishonesty.

Evidence that any witness has been convicted of a crime shall be admitted if it involves dishonesty or a false statement. Rule 609(a)(2), SCRE. Even though the Court held in State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct App. 2003), that armed robbery was a crime of dishonesty and automatically admissible; nonetheless, in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), the Court adopted the position that a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. See, United States v. Smith, 181 F. Supp. 2d 904 (N.D. Ill. 2002). Moreover, even stealing is not always a crime of dishonesty if there are no additional affirmative false statements or acts of deceit beyond the crime itself. State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (2013). In Broadnax, where the defendant was on trial for armed robbery, the Court held that it was error to admit the defendant's prior armed robbery convictions for the purpose of impeachment because there was nothing presented to show any further affirmative false statements or acts of deceit beyond the basic crime itself, and that prejudice resulted because the priors were identical to the charge of armed robbery for which he was on trial. In Bryant, the Court held it was error for the state to use the defendant's prior firearms convictions for impeachment during his trial on charges of murder and unlawful possession of a weapon because the prior firearms convictions did not involve dishonesty and were not probative of truthfulness, particularly where the priors were similar to the offenses for which the defendant was on trial. Note further that violations of narcotic laws are generally not probative of truthfulness either. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001).

The basis of admitting a prior of dishonesty is not to show that one is a bad person, but rather that one has a propensity to lie, which would bear on one's believability, truthfulness and credibility. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). In Black the court held that the prior crime of manslaughter admitted against him during his criminal sexual conduct trial was error

because manslaughter is not a crime of dishonesty or untruthfulness that directly impacted the witness' veracity.

Also, the argument that the crime of accessory after the fact to murder should be viewed as a crime of dishonesty or false statement in effect because the definition of the crime is to evade public justice and/or to actively suppress evidence and that this has an obvious bearing on the defendant's credibility cannot stand as a tenable argument. Essentially, the gist of such a position is that when a criminal commits a crime and tries not to get caught, the crime should be considered a crime of dishonesty under Rule 609 (a)(2), SCRE. However, the intent to evade public justice certainly does not imply a general disposition toward dishonesty. Here, the respondent pled guilty to accessory after the fact to murder after failing to tell authorities what he knew about a homicide. App. 465, l. 10 – p. 467, l. 1; App. 780. The PCR Court found that the respondent was acting out of fear for his life, and there is nothing in the record to contradict that story. App. 780.

The respondent's accessory after the fact of murder conviction was not a crime of dishonesty because, as the PCR court correctly noted, "doing or not doing something out of fear for one's personal safety does not necessarily indicate dishonesty." Additionally, there was nothing presented beyond the crime of accessory beyond the basic crime that would indicate that the same was committed under the veil of dishonestly; and finally, there is nothing about the offense of accessory after the fact to murder which would have been probative of a general disposition toward dishonesty in the same manner that manslaughter was found to have been a dishonest crime that would impact veracity. To find that a crime committed with the "intent to evade public justice" is a "crime of dishonesty" would make crimes such as resisting arrest and failure to stop for a blue light "crimes of dishonesty." Even states that view larcenies as "crimes of dishonesty" have not extended *Rule* 609 (a)(2) to cover prior convictions for accessory after the fact and resisting arrest.

Commonwealth v. Harris, 442 Pa. Super. 116, 658 A.2d 811 (1995) (holding: hindering apprehension was not a crime of dishonesty), People v. Stover, 89 Ill. 2d 189, 432 N.E.2d 262 (1982) (resisting arrest was not a "crime of dishonesty").

Therefore, based on the foregoing argument, this Court should affirm the PCR Court's correct finding that the prior in question was indeed not a crime of dishonesty and would probably have been ruled inadmissible at trial but for counsel's ineffectiveness in not objecting to the same at trial.

SHOWING OF PREJUDICE

The proper standard of review for and appeal of a post-conviction relief hearing is whether any evidence exists to support the PCR Court's findings. Cherry v. State, 300 S.C. 115, 383 S.E.2d 624 (1989). If any evidence exists to support the PCR Court's findings, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998).

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. Rule 609(a)(1), SCRE. In the respondent's case, the admission of the prior accessory after the fact to murder conviction was never objected to at trial; so the trial judge never engaged in this balancing test. However, the PCR Court found that the "admission of the applicant's prior conviction was *much* more prejudicial than probative." App. 781 (emphasis added). The PCR judge found, in part, that the jury likely used the prior conviction for accessory after the fact to murder to prove action and conformity therewith. App. 781. The PCR judge found that the respondent was prejudiced because there was little evidence to disprove the respondent's claim of self-defense. App. 781. Moreover, due to the similarity of *accessory after the fact to murder* and *murder*, the PCR Court's findings are supported by evidence of the record. *See Cherry, Supra.*

The suggestion that accessory after the fact to murder and murder have different elements, and that the prior conviction was necessary because it demonstrated the respondent's willingness to impede the administration of justice is not compelling because this would impart a highly technical knowledge of criminal law to the jury. The PCR court correctly found that admitting evidence of accessory after the fact to murder in a murder trial would likely leave the jury to use it as impermissible character evidence. App. 781. This conviction was probably not used by the jury to show that the respondent was willing to "impede the administration of justice," but rather that he was an accessory to a homicide and spent four months at the Department of Juvenile Justice as a result. App. 465 l. 10 – App. 467 l. 19.

A jury is not likely to differentiate between the respondent's prior accessory after the fact to murder conviction and the murder charge for which he was on trial. In other words, the jury probably processed the prior as a negative portrayal of the respondent as one who is predisposed to involve himself in murder situations, and that he was probably guilty of the murder charge for which he was on trial. Compare State v. Green, 338 S.C. 428, 527 S.E.2d 98 (2000), where trial counsel was found ineffective in failing to object to the admission of the defendant's prior convictions of possession of cocaine and possession of crack cocaine while he was on trial for distribution of crack cocaine charges because the prejudicial effect of the jury hearing those priors outweighed any probative value. Compare also the case of Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), where counsel was found ineffective in failing to object to testimony about the defendant's mafia and devil worship associations (and a prior manslaughter conviction) also while he was being tried for murder, assault and battery with intent to kill, and burglary because this suggested that the defendant was a bad person who possessed a propensity to commit the crimes charged in that case. More importantly, see again Broadnax, where the Court held that the

admission of the armed robbery priors prejudiced the defendant because the priors were identical to the armed robbery charge for which he was on trial at the time.

Prior bad acts evidence is inadmissible to show that the accused is a bad person, especially where the prior crimes are similar to the one for which the accused in on trial. State v. Colf, 337 S.C. 622, 525 S.E.3d 246 (2000); State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2007); State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984). This is especially true where the defendant's credibility is on the line. See State v. Green, supra. Here, there was no overwhelming evidence of guilt in the case and note that petitioner's self-defense claim was viable and not disproved by the state; and also note that the prior (which involved a murder incident) was similar to the crime of murder for which the respondent was on trial.

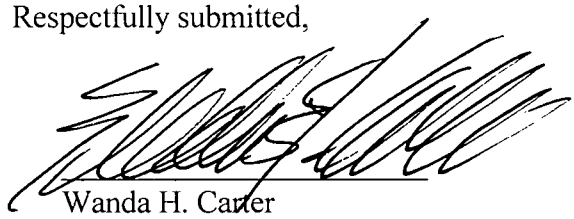
In order to prevail in a case where ineffective assistance of counsel is alleged, one must show that counsel's legal representation was below the standard of competence to the point of deficient legal performance and that this deficient legal performance prejudiced one's case, and that but for the incompetence, a reasonable probability exists that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). In the case at bar, the PCR judge correctly found that the admission of the prior at issue was much more prejudicial than probative of the respondent's credibility. Therefore, if objected to, the trial judge likely would have also found that the same was not admissible under *Rule* 609(a)(2), SCRE, and would have suppressed the prior conviction. In other words, had the prior not been admitted, there was a reasonable probability that the outcome of the respondent's trial would have been different. There is no question that the prior crime evidence portrayed appellant as one who involved himself in murder incidents and that this certainly marked his character as such. This meant that the jury could not avoid processing the prior to mean that the respondent was probably guilty as charged on the murder offense for which he was

being tried, which in turn meant that the prejudicial value of this prior crime testimony outweighed any probative value and affected the jury verdict. An error is not harmless if it affected the jury verdict. State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006).

CONCLUSION

Therefore, based on the foregoing argument, the respondent requests that this Court deny the petitioner's petition for writ of certiorari and uphold the decision of the Court of Appeals in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 27th day of August, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2014-UP-122 (S.C. Ct. App. filed March 19, 2014)
08-CP-40-01696.

Appellate Case No. 2014-001126

AYREE HENDERSON,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals, and Mr. Ayree Henderson # 237887, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 27th day of August, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of August, 2014.

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