

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County
G. Edward Welmaker, Circuit Court Judge

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OCT - 8 2014

S.C. Supreme Court

DARNELL COLIN RUSSELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000298

PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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The PCR court erred in finding that trial counsel rendered effective assistance of counsel where (1) trial counsel failed to object pre-trial to inadmissible evidence of prior drug transactions on an audiotape played to the jury; (2) trial counsel did not contemporaneously move for a mistrial once the inadmissible evidence was heard by the jury; and (3) trial counsel elicited the inadmissible evidence himself during cross-examination of the confidential informant. 4

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where (1) trial counsel failed to object pre-trial to inadmissible evidence of prior drug transactions on an audiotape played to the jury; (2) trial counsel did not contemporaneously move for a mistrial once the inadmissible evidence was heard by the jury; and (3) trial counsel elicited the inadmissible evidence himself during cross-examination of the confidential informant?

STATEMENT

Indictments

On June 15, 2010, Petitioner Darnell Colin Russell was indicted by the Pickens County Grand Jury for (1) distribution of cocaine base (crack cocaine), second offense, in violation of S.C. CODE ANN. § 44-53-375; and (2) distribution of cocaine base within ½ mile of a school in violation of § 44-53-445.

Trial and Guilty Verdict

Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury on October 23, 2012. App. 1. Petitioner was represented by Scott D. Robinson, and the State was represented by Assistant Solicitor Samuel B. Tooker. Id.

On October 24, 2012, the jury found Petitioner guilty on both charges. App. 128, ll. 17-23. Judge Hill sentenced Petitioner to eight years on the proximity charge and five years on the second offense distribution charge. The sentences were ordered to run concurrent. App. 132, ll. 4-7; 199; 204. Petitioner did not file a direct appeal.

Application for Post-Conviction Relief, Evidentiary Hearing, and Order of Dismissal

Petitioner filed his application for post-conviction relief (“PCR”) on January 22, 2013. App. 135-141. The State filed its Return on or about July 3, 2013. App. 142-145.

An evidentiary hearing was held before the Honorable G. Edward Welmaker on December 16, 2013. Petitioner was represented by R. Mills Ariail, Jr., and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 149. Both Petitioner and his trial counsel testified at the hearing. App. 152-179.

Judge Welmaker issued his Order of Dismissal on January 24, 2014 denying and dismissing Petitioner’s PCR application. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that trial counsel rendered effective assistance of counsel where (1) trial counsel failed to object pre-trial to inadmissible evidence of prior drug transactions on an audiotape played to the jury; (2) trial counsel did not contemporaneously move for a mistrial once the inadmissible evidence was heard by the jury; and (3) trial counsel elicited the inadmissible evidence himself during cross-examination of the confidential informant.

Relevant facts of trial

On July 22, 2009, Officer Brad Smith of the Pickens County Police Department, along with Detective Travis Riggs, set up a controlled drug buy with confidential informant Carmilithia Staton. App. 28, ll. 6-24. Officer Smith testified that on the day of the controlled buy, he searched Staton prior to the buy and did not find any drugs on her person. App. 31, ll. 19-23.

Officer Smith also set up surveillance to monitor Staton through audio. He also positioned his vehicle so he could watch Staton walk to the residence where she was supposed to conduct the drug buy. App. 32, l. 1 – 34, l. 1. From Officer Smith's position, he was able to watch Staton walk down the street to the targeted residence. Once Staton walked around the corner of the residence, however, he was no longer able to observe her movements. App. 34, ll. 2-23.

While he could hear the audio of the alleged transaction, Officer Smith acknowledged that he did not actually see any exchange of drugs and money. Staton was out of Officer Smith's vision for about four minutes. When Staton came into Officer Smith's vision again, she was walking to meet up with Detective Riggs at a CVS where Detective Riggs was stationed. App. 35, l. 2 – 36, l. 1. Officer Smith testified that Staton gave him 0.10 grams of crack cocaine after the alleged buy. App. 36, l. 2 – 38, l. 11.

On cross-examination, Officer Smith admitted that he never saw Petitioner the day of the alleged drug buy. He also had no idea who owned the residence that Staton went to that day to purchase the drugs. Officer Smith also admitted that there were about three or four people in the residence when Staton allegedly made the drug deal. Officer Smith also never recovered any of the money he gave to Staton for the drug purchase from Petitioner. App. 38, l. 25 – 40, l. 1.

Confidential informant Carmilithia Staton had smoked crack on and off for about ten years and had nine shoplifting convictions. App. 49, ll. 4-18. During her testimony, the solicitor played the audiotape of the alleged drug transaction between Staton and Petitioner. App. 50, l. 4 – 51, l. 5. Staton testified that on the day of the drug buy she went to a trailer where someone named Nate lived. Staton said that Petitioner lived on the other side of town, but would hang out at Nate's house. App. 51, l. 18 – 52, l. 12. Staton claimed that she went inside the trailer and bought crack from Petitioner. App. 53, ll. 17 – 21. Staton acknowledged there were other people in the trailer when she allegedly bought the crack from Petitioner. App. 53, l. 22 – 54, l. 7.

On the audiotape played for the jury, Staton, while making the alleged drug deal with Petitioner, made comments on previous drug purchases from Petitioner. See Court's Ex. 2 (audio). Petitioner's trial counsel did not object to the mention of these prior bad acts while the audiotape was playing for the jury. During arguments outside of the jury about other issues with Staton's testimony, the Trial Court itself actually raised the issue:

But it does bring up something I heard earlier in the trial on the tape. There were statements made about - - that could be construed as this witness, Ms. Staton, commenting on previous purchases from [Petitioner.] What is the State's position on that?

App. 63, ll. 14-18.

The solicitor contended the State needed to have evidence of the prior drug purchases to show the jury how these drug transactions worked – that people just do not buy drugs from strangers. App. 63, l. 19 – 64, l. 10. At that point, Petitioner’s trial counsel did finally move for a mistrial because the audiotape played for the jury interjected prior bad acts that should not have been before the jury. App. 64, ll. 11-18. The solicitor then pointed out to the Trial Court that Petitioner’s trial counsel and the solicitor had listened to the tape together in its entirety a week earlier and trial counsel made no pre-trial motion to redact the references to the prior transactions. The solicitor also argued that Petitioner’s trial counsel “did not object to that information as the tape was being played” before the jury. App. 64, ll. 23-24. The Trial Court agreed that no objection was made by Petitioner’s trial counsel, although he stated that he would ponder the mistrial motion. App. 66, l. 25 – 67, l. 1.

The confidential informant, Staton, then continued her testimony on direct examination and again testified that Petitioner was the person who she purchased the crack cocaine from on the recording. App. 68, ll. 22-24.

On cross-examination, Petitioner’s trial counsel then brought out references to the prior drug transactions between Staton and Petitioner, including that Staton said on the tape that Petitioner does not really give good amounts or good drugs. App. 71, ll. 11-21.

Staton admitted that Petitioner said on the tape he did not want to cooperate with her, but she still testified to the jury that Petitioner was the person who sold her the drugs. App. 75, ll. 3-7.

Detective Riggs admitted that he never observed Petitioner sell any drugs to Staton. App. 84, ll. 19-24.

The Trial Court eventually ruled on Petitioner's mistrial motion and denied it, finding that Petitioner's trial counsel elicited information about the prior transactions during the cross-examination of Staton. The Trial Court also stated there was no need for a mistrial "under those circumstances, particularly when the evidence was not objected to initially." App. 89, ll. 7-17. Had there been a contemporaneous objection by Petitioner's trial counsel and had Petitioner's trial counsel not elicited this evidence on cross-examination of Staton, the Trial Court indicated that he would have granted the mistrial motion when criticizing the State's argument that the prior transactions were admissible:

The Trial Court: I think the issue, though, Mr. Tooker, is whether in a prosecution for distribution of drugs on a certain date when there's not a conspiracy alleged and the date is a discrete date, place and time, and under those circumstances, is the confidential informant's statements concerning previous drugs buys from the same Defendant proper under any circumstances? Do you have some case that says just because of the nature of drug transactions the State can parade in witnesses to show numerous other transactions that are not indicted?

Mr. Tooker: No, sir.

The Court: Well, isn't that what you're arguing?

Mr. Tooker: Well, I mean, effectively, what I'm arguing is the 404(b) exception. You know, I'm going to identify. So I mean, what - -

The Court: What's the difference between that and the example I gave about bringing in other transactions?

Mr. Tooker: I mean, I can see that it [sic] certainly murky.

App. 90, ll. 2-20.

The Trial Court went even further to assert that it understood the State's theory about this evidence but "respectfully disagree[d] with it." App. 92, ll. 7-9. Therefore, had

Petitioner's trial counsel made a timely objection and motion for mistrial and had not elicited the testimony on cross-examination, it was clear the Trial Court would have granted the motion or would have required the solicitor to redact the audiotape before it was played to the jury had Petitioner's trial counsel objected pre-trial.

Ultimately, the jury found Petitioner guilty of both the distribution and proximity charges. App. 128, ll. 17-23.

Relevant Facts of PCR Evidentiary Hearing

Petitioner's trial counsel admitted at the evidentiary hearing that he should have timely objected to the evidence of the prior transactions and timely moved for a mistrial, but that he did not and he had no strategy or reason for not doing so:

Q: There's a mentioning in regards to the trial that there was some other, I guess, chatter on there by Ms. Staton of previous drug transactions that she had done with [Petitioner], correct?

A: Right. Correct.

Q: Okay. And I guess the question is, in this, I mean, he's been convicted of this. Why in that circumstance did you not object at the time to allowing those other previous, I mean, references to drug transactions coming in?

A: I think what I should have done in that case, really, after looking back at it, I probably should have moved for a mistrial at that time to keep that information out of it. I just didn't object at that time. I think.

Q: Well, a mistrial - - I guess, my question is, - - -

A: It should have been redacted.

Q: Yeah. Why did you not make a motion - was there any reason why you didn't make a motion to redact that previous to the trial beginning?

A: No, sir.

Q: Okay.

A: I really had no -- I can't tell you the exact reason for ---

App. 165, l. 8 – 166, l. 6.

Petitioner's trial counsel also admitted the prior drug transaction testimony was detrimental since the case really depended on the credibility of the confidential informant:

Q: Well, in this case, my concern . . . then if that type of information comes in, that's going to be detrimental to [Petitioner], correct, about him doing previous drug transactions?

A: It could be, but you really didn't -- on that tape you really didn't know who the person was in this house or place. There were a number of people in there I think. And I think they didn't really -- the officers didn't see -- I don't believe they saw him. I think the only person would be the confidential informant and her credibility is very bad.

App. 166, l. 17 – 167, l. 3.

Petitioner's trial counsel also conceded he should not have elicited testimony about the previous drug transactions from the confidential informant when cross-examining her:

Q: My question in regards to that is -- and I think Judge Hill references it later on -- when you moved for a mistrial, he said that you had elicited information that would have showed that he had conducted previous drug transactions?

A: Yes. That's what [sic] alludes to.

Q: What was the basis -- I guess, in regards to your cross-examination, why were you trying to elicit that or get that type of information?

A: I don't think that information -- I probably should have objected at that point ---

Q: Okay.

A: --- to keep that out, I believe.

App. 167, l. 21 – 168, l. 8.

Order of Dismissal

The PCR court ruled that Petitioner failed to meet his burden of proving trial counsel should have objected to the admission of the prior bad acts contained on the audio tape. The PCR court found that Petitioner's trial counsel had objected to the admission of the audiotape but that he was overruled by the Trial Court. The PCR court also found that trial counsel made a sufficient motion for a mistrial. App. 192.

Discussion

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

The references on the audiotape to the previous drug transactions was not admissible evidence, and there was a reasonable probability that the Trial Court would have required these references to be redacted before the tape was played to the jury had Petitioner's trial counsel objected to the references prior to the tape being played for the jury or would have

granted a mistrial had trial counsel contemporaneously objected once the prior transactions were heard by the jury.

The evidence of the prior drug transactions was clearly inadmissible. Evidence that a defendant has committed other unrelated crimes or bad acts is inadmissible to prove the defendant's propensity to commit the crime with which he is charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

It is only in exceptional cases that another crime or bad act is relevant to an issue other than the accused's character. Such exceptions to the general rule which permit the admission of evidence of other crimes or bad acts are applicable only where the prior bad act directly supports some substantial element of the State's case or is relevant to establish a material fact or element of the crime charged. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

In State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), the Court of Appeals held that the trial court improperly admitted testimony from an informant about previous drug purchases from the defendant in a case where the defendant was charged with distribution of crack cocaine. The court held that the informant's testimony did not fit the Lyle exception for a common scheme or plan and that "[b]y introducing the prior bad acts, the State was not trying to prove a common scheme but to convince the jury that because [the defendant] sold crack cocaine in the past, he was selling crack cocaine on

this occasion. This is precisely the type of inference that Lyle prohibits.” Campbell, 317 S.C. at 451, 454 S.E.2d at 901.

The Campbell court further remarked that “[w]hen the prior bad acts are strikingly similar to the one for which the appellant is tried, the danger of prejudice is enhanced.” Id. at 451-52, 454 S.E.2d at 901 (internal citations omitted).

Subsequently, in State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), the Court of Appeals held in another distribution of crack cocaine case that evidence of a drug transaction involving the defendant and a cooperating government witness four days before the transaction giving rise to the charge against the defendant was not admissible for any proper purpose. In so holding, this Court observed “[i]n the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.” Id. at 467, 476 S.E.2d at 917.

As in Campbell and Carter, the evidence of the prior drug transactions was inadmissible in Petitioner’s case. The Trial Court expressed its belief that the evidence was inadmissible, but without an objection by trial counsel before trial to have the references to the prior drug transactions redacted from the audiotape or a contemporaneous objection for a mistrial while the tape was being played for the jury, the Trial Court was limited in the relief it could provide to Petitioner. Furthermore, the Trial Court noted that Petitioner himself elicited such testimony during the cross-examination of the confidential informant.

While the PCR court found that trial counsel did object to the admission of the audiotape and moved for a mistrial, these objections were not sufficient. When trial

counsel objected to the admission of the audio tape before it was played to the jury, he did not object on the basis of the references to the previous drug transactions but only on foundation. App. 50, ll. 17-22. Therefore, this objection was insufficient to alert the Trial Court that references to the prior drug transactions needed to be redacted before the tape was played to the jury.

Second, while trial counsel did eventually make a motion for a mistrial, he did not make such a motion while the tape was being played or even immediately following the conclusion of the tape being played for the jury. Trial counsel only did so after the Trial Court itself raised the issue of the previous drug transactions being mentioned on the tape. App. 63, l. 14 – 64, l. 18. This was not a timely objection and any error by the Trial Court would not have been preserved for appellate review had Petitioner filed an appeal. See State v. Simmons, 384 S.C. 145, 171-72, 682 S.E.2d 19, 32-33 (Ct. App. 2009) (concluding appellant's argument that the trial court should have granted his mistrial motion due to prejudicial witness testimony was unpreserved when appellant failed to timely object to witness's testimony and waited until after witness testified before requesting a mistrial).

At the evidentiary hearing, trial counsel offered no valid reason for why he failed to object to the references to the previous drug transactions prior to the tape being played, why he failed to timely move for a mistrial, or why he elicited such testimony during the cross-examination of the confidential informant. App. 165, l. 8 – 166, l. 6; 167, l. 21 – 168, l. 8; 171, ll. 5-10 (“I don't know strategically what I was thinking that particular day.”).

It cannot be said beyond a reasonable doubt that the evidence of the previous drug transactions did not contribute to the jury's verdict where the only evidence that Petitioner

sold drugs was the testimony of the confidential informant whose credibility was questionable. The two officers who testified at trial did not observe Petitioner selling any drugs to the confidential informant.

Therefore, where the evidence of the previous drug transactions would have been redacted by the Trial Court from the audiotape had trial counsel objected pre-trial or where the Trial Court would have with a reasonable probability granted Petitioner's motion for a mistrial had trial counsel timely objected and not elicited such testimony himself during cross-examination of the confidential informant, Petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Darnell Colin Russell respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of October, 2014.

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IN THE SUPREME COURT

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G. Edward Welmaker, Circuit Court Judge

DARNELL COLIN RUSSELL,

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RESPONDENT.

APPELLATE CASE NO. 2014-000298

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 have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of October, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of October, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.