

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Anderson County
R. Lawton McIntosh, Circuit Court Judge

KEVIN WARE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000545

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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Division of Appellate Defense
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INDEX

INDEX.....1
ISSUE PRESENTED2
STATEMENT3
ARGUMENT4
CONCLUSION9

ISSUE PRESENTED

Trial counsel erred in failing to fully and completely impeach state's witness Virginia Richardson on her entire lengthy criminal record because she was the only witness from the scene who presented testimony consisting of direct evidence linking the drugs found at her house to petitioner; and therefore, her impeachment would have proved that she lacked credibility as a witness, which was critical to petitioner's defense in the case.

STATEMENT

Petitioner Kevin Ware was convicted of possession of crack cocaine with intent to distribute and possession of crack cocaine with intent to distribute within proximity of a park per jury trial held during the January 2009 term of the Anderson County General Sessions Court before Judge J.C. Nicholson, Junior. Petitioner was sentenced to imprisonment for an aggregate period of ten years. App. 1 – 221. Bruce A. Byrholdt represented petitioner at trial and Assistant Solicitor Matthew Bradley appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed. See State v. Ware, Unpublished Op. No. 2011-UP-273 (S.C. Ct. App. filed June 8, 2011). Lanelle C. Durant represented petitioner on direct appeal.

On October 30, 2012, petitioner filed a PCR application with the Anderson County Office of the Clerk of Court raising allegations of ineffective assistance of trial counsel in the case. App. 223-236. The respondent filed a return dated August 2, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 237 – 241.

A PCR hearing was convened on September 18, 2013, at the Anderson County Courthouse before Judge R. Lawton McIntosh. App. 243-269. Petitioner was present at the hearing and represented by Hugh Welborn, and Assistant Attorney General John W. Whitmire appeared on behalf of the state. On February 25, 2014, an Order of Dismissal was filed by Judge McIntosh. App. 271-280.

Petitioner appealed Judge McIntosh's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to fully and completely impeach state's witness Virginia Richardson on her entire lengthy criminal record since she was the only witness from the scene who presented testimony consisting of direct evidence¹ linking the drugs found at her house to petitioner; and therefore, her impeachment would have proved she lacked credibility as a witness, which was critical to petitioner's defense in the case.

On the night of January 15, 2007, police officers executed a search warrant at Virginia Richardson's home. At trial, only four witnesses who were present at Virginia Richardson's house where the crack cocaine was found testified at trial. The four witnesses were Virginia Richardson and three police officers.²

Police Officer Kevin Marsee testified that he assisted in the execution of the search warrant at Virginia Richardson's home and that when he entered the home, he saw petitioner was lying on top of a bag of crack cocaine while struggling simultaneously with another officer who was also inside the house. App. 47, l. 13 – p. 50, l. 5.

Police Officer Edward J. Aman testified that he assisted in the execution of the search warrant at Virginia Richardson's home also, and that when he entered, he saw petitioner "fling some object into the air" and that "the object struck him in the chest." Officer Aman added that Officer Culbertson, who was another officer that was present inside the home, apprehended petitioner. App. 56, l. 10 – p. 59, l. 7.

¹The four witnesses from the scene who testified at trial were the three police officers that presented testimony that constituted circumstantial evidence linking petitioner to the drugs, and Virginia Richardson, who presented direct evidence linking petitioner to the drugs found in the house via her testimony that petitioner brought crack cocaine to her house at her behest.

² Officers Kevin Marsee, Edward J. Aman, and Jody Culbertson.

Officer Jody Culbertson testified that he assisted also in executing that search warrant at Virginia Richardson's house, and that he saw petitioner throw an "item that hit [one of the officers]" after they entered, and that he handcuffed and arrested petitioner thereafter. App. 65, lines 12 – 17.

Virginia Richardson testified at trial and explained that she asked petitioner to bring some crack cocaine to her on the night in question, and that after petitioner did so, police entered minutes later while petitioner sat unwrapping the drugs. Richardson stated that she saw petitioner "throw it (crack cocaine) at the wall" before he was arrested. App. 114, l. 10 – p. 118, l. 7.

During the solicitor's direct examination of Virginia Richardson, a question was asked about whether she had "a few shoplifting convictions." Richardson answered in the affirmative. App. 119, l. 24 – p. 122, l. 1. On cross examination of Richardson, defense counsel began to ask her about whether she had a breaking and entering prior when the solicitor objected (before she could answer) on the ground that her record had not been settled previously. An in camera hearing then followed.

During the in camera hearing, the trial judge overruled the solicitor's objection (since he opened the door to going beyond the ten-year prior rule with all of her shoplifting priors) and allowed impeachment of Richardson on her record beyond ten years and under ten years. App. 124, l. 20 – p. 125, l. 3. Also during the in camera hearing, defense counsel went on to review Virginia's record, which included at least three shopliftings priors, a stealing city property prior, a breaking and entering prior, and a marijuana prior, a theft prior, and a larceny prior just to name a few, all of which the trial judge ruled were admissible on cross examination of Richardson. App. 124, lines 16 -19; App. 125, lines 14 – 19; App, 125, l. 24 –p. 126, l. 1.

Nevertheless, after the close of the in camera hearing into the matter, defense counsel went on to cross examine Virginia Richardson, but failed to question her about **any** of her priors.

Defense counsel queried Virginia Richardson on **none** of her priors on cross-examination. App. 127, l. 8 – p. 129, l. 5.

During the PCR hearing, petitioner testified that trial counsel erred in not impeaching Richardson on **any** of her priors and that had counsel done so, then this information in effect would have had an impact on the jury that was favorable to the defense because this was “relevant” to his case. App. 258, l. 16 – p. 259, l. 25.

Trial counsel testified at the PCR hearing and addressed the issue of the impeachment of Virginia Richardson. Counsel explained that Richardson was impeached on direct examination when she revealed to the solicitor that her probation had previously been revoked for failing a drug test and that she had shoplifting priors; and that thereafter, Richardson had “no credibility after [her direct examination testimony].” App. 265, lines 5 – 16; App. 266, l. 11 – 12. Also, note that during the solicitor’s direct examination of Richardson, she revealed that due to the events that occurred on that night, she thought she would have been charged “with running a crack house,” but that she was arrested and charged with drug conspiracy only (to which she ultimately plead guilty) in connection with the incident instead. App. 119, l. 1 -18.

The PCR judge ruled in effect that trial counsel was not ineffective in failing to fully impeach Virginia Richardson as a witness on cross examination because she was impeached via her answers given on direct examination, which sufficiently damaged her credibility, and that any extended impeachment would have been meaningless. App. 277-278.

The general rule on impeaching a witness’ credibility is found under Rule 609, SCRE, to the extent that a witness other than the accused may be impeached with a prior conviction that carries a sentence of more than one year and that the prior is subject to a Rule 403, SCRE, analysis of the probative value versus the prejudicial value of the prior. State v. Black, 400 S.C 10, 732 S.E.2d 880

(2012); State v. Brayboy, 401 S.C. 207, 736 S.E.2d 679 (2014). Here, trial counsel erred in failing to impeach Virginia Richardson with her prior record on cross examination and choosing to rely instead on the assumption that Richardson sufficiently self-impeached herself per her answers given on direct examination because this prejudiced petitioner's defense since it denied him of the right to complete defense. Also, the exposure of as many of Richardson's priors as possible would have established full and sufficient impeachment in order to prove without a doubt that she had no credibility as a witness.

Counsel's omission in this regard was particularly prejudicial because Richardson's testimony was pivotal and crucial to the extent that no other witness placed the drugs in petitioner's possession directly (as opposed to circumstantially by police) before and after he arrived at her home. Richardson stated that she asked petitioner to bring the drugs to her house, and assigned possession of the drugs to him after he arrived at the house, and added that petitioner was unwrapping the drugs when the police arrived. App. 114, l. 10 – p.118, l. 7. Richardson's testimony consisted of direct evidence through damaging background information whereas the officers could only testify as to the events observed at the scene when they arrived at the house.

Therefore, since Richardson's testimony was crucial to the state's case, then clearly, Richardson's full and complete impeachment attacking her credibility was equally crucial to petitioner's defense. In cases where credibility is a deciding factor, impeachment issues become critical. See Green v. State, 338 S.C. 428, 527 S.E.2d 98 (1999), where the Court held the counsel was ineffective in failing to object to the prejudicial effect of allowing impeachment via defendant's possession of crack and cocaine priors at a trial where he was being tried on a distribution of crack charge because the prejudicial value of the prior outweighed the probative value because "[the defendant's] credibility [was] critical." In Green, the police officer who conducted a controlled buy

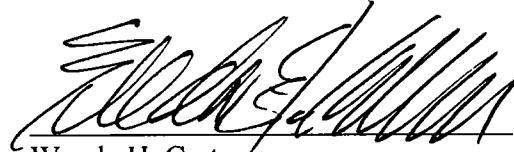
of crack from one man whom he identified as Green standing among numerous men when the transaction occurred was challenged by Green's testimony when Green explained that the officer's identification was incorrect as it was not him, but rather another man in the group who sold him the crack.

In order for an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show that his counsel failed to render reasonable effective assistance under prevailing professional norms and that he was prejudiced by counsel's ineffective performance. See State v. Green, *supra*, citing to Strickland v. Washington, 466 U.S. 668 (1984). Here, counsel erred in failing to fully and completely impeach the credibility of Richardson because she was the only witness who presented testimony consisting of direct evidence that petitioner was connected to the drugs confiscated from her house on the night in question as opposed to the testimony of the police officers who could only circumstantially link petitioner to possession of the drugs. Thus, counsel rendered deficient legal representation at petitioner's trial in this regard, and counsel's error prejudiced petitioner's defense because Richardson's testimony was so damaging that her credibility was critical to the defense. Had Richardson been fully and completely impeached as a witness, then her lack of credibility would have been undeniably apparent and thereafter, a reasonable probability existed that the outcome of petitioner's trial might have been different. Counsel's error in this instance violated petitioner's right to competent representation by a criminal attorney at trial as guaranteed the Sixth Amendment to the United States Constitution. See Strickland v. Washington, *supra*.

CONCLUSION

Based on the foregoing argument, petitioner requests that this petition be granted and full briefing allowed on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of Octoberer, 2014.

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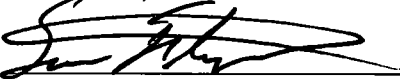
CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kevin Ware #269271, at Abbeville County Jail, 21 Old Calhoun Falls Rd, Abbeville, SC 29620, this 8th day of October, 2014.


Wanda H. Carter
Deputy Chief 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 30, 2022.