STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John, Circuit Court Judge

TOMMY TOOMER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000649

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1.

Whether the PCR Court erred by ruling defense counsel preserved the issue of whether Wanda Garrett's testimony that petitioner had hit her with a stick on a prior occasion or occasions was admissible under the prior bad act exception where the Court of Appeals held the issue was not preserved for appellate review, and the PCR court also erred by finding a lack of prejudice because this prior bad act was admissible evidence anyway?

2.

Was defense counsel ineffective for failing to request a jury instruction on voluntary manslaughter where he testified he believed if he had requested this instruction the jury would have convicted petitioner of voluntary manslaughter, and where there was no evidence to support the PCR court's ruling that defense counsel discussed his alleged "all or nothing strategy" strategy with petitioner?

STATEMENT OF FACTS

This case was a swearing contest between petitioner and a crack addict named Wanda Garrett. Conway Police Officer Reginald Hill was a shift supervisor on May 17, 2005 when a telephone call came in from Sycamore Street about "a subject had been hit in the head with a pipe." App. 49, l. 18 – 50, l. 7. When Hill arrived he found the decedent "laying in a backyard . . . he was laying straight out." App. 52, l. 21 – 53, l. 4.

The decedent was unconscious. Hill remembered petitioner and Wanda Garrett both being at the scene. App. 54, ll. 6-20. Petitioner later testified that Wanda Garrett told him the decedent, who was grossly intoxicated on drugs and alcohol, had fallen off of the porch. That was the reason the decedent was laying in the yard. Hill interviewed petitioner who told him he had come home and drank with Garrett and the decedent all evening. Petitioner said the decedent fell off the porch. Petitioner related that he was the only one sober enough to talk to 911and EMS. Officer Hill confirmed that petitioner was most sober person at the scene. App. 56, ll. 3-19.

Wanda Garrett testified that petitioner's house was actually a crack house. She lived there with petitioner and her sister for about three or four months. App. 69, l. 9 – 45, l. 11. Garrett claimed at trial that she had been "clean for some period of time now." App. 70, ll. 18-20. The solicitor ridiculing Garrett -- his own key witness – in closing, as will be seen infra, raised doubt about that fact.

Garrett said Jerome Tucker, also known as Cowboy, always showed up "with four cold beers, one for me, one for him, one for my sister, and one for us to share." App. 72, l. 17 – 48, l. 14. Garrett described Tucker as her lover, and she said: "I loved him. I'll love him till the day I die." App. 74, ll. 11-25.

Garrett testified that she was also petitioner's "girl." Garrett offered that petitioner "took me [in] there because I was homeless, [he] took me and my sister there." App. 75, ll. 5-14.

Garrett maintained that she was drinking and doing drugs that night with Tucker, petitioner and "Red." She said Red was a "Kinky haired" Puerto Rican. Garrett claimed everything was "fine" until she started talking with Tucker about moving out of petitioner's house. She speculated that petitioner may have overheard the conversation, and that caused him to grab a large stick out of the bedroom window. When the solicitor asked if Garrett had seen the stick before, defense counsel objected , citing Rule 404 (b), SCRE. A bench conference was then held. The judge then stated, "I have permitted the testimony on this issue." App. 80, l. 3 -81, l. 20.

The judge ruled this testimony was permissible and Garrett then said she had seen the stick "on a number of occasions." Garrett also maintained that Tucker stood up to protect her from petitioner, and she claimed that petitioner hit the decedent – she thought in the shoulder – and Tucker went to the floor. "I said, `Come on, Cowboy, don't do this to me. Stop playing games.'" Garrett said she thought at first that Tucker was "faking it or passed out" from being intoxicated. She maintained that she ran across the street to call 911. App. 77, 6 – 58, l. 24.

Petitioner argued on direct appeal that this testimony was inadmissible prior bad acts evidence that did not meet an exception to the Rule. The Court of Appeals held the argument was not preserved for appellate review because it did not know on what basis the judge admitted the evidence, and because the appellant had the duty to make a sufficient record for the appellate court to review. Supp.App. 1-3; 5, 9-14.

Garrett said petitioner told her that night that the decedent was drunk and that he fell down the steps. "That's the only thing that happened here." Garret said she was scared to say anything and that "they would have killed me. This is a crack house. They don't play." App. 88, ll. 8-17.

On cross-examination defense counsel Galmore questioned Garrett about her statement to the police and he obviously questioned her memory of the events of that night. He specifically questioned her about the fact the stick he claimed was used was never found. 10. Counsel also had Garrett admit she remained living in petitioner's house for two or three days after petitioner's arrest where she claimed she was afraid of people because this was a crack house. Garrett also acknowledged she was never charged with anything in this case. App. 95, l. 11 – 112. 14.

Garrett repeated her contention about them drinking and doing drugs and everything being fine until petitioner allegedly hit the decedent with the stick.

The sixty-year-old petitioner Toomer took the stand in his own defense. App. 140, ll. 13-20. Petitioner said he was renting the house and he allowed Garrett and her sister to move in "until they could get their check, and they was [were] supposed to move out." They did not move out as they had promised. App. 142, ll. 2-10.

Petitioner testified that on May 18, 2005 he came home with a half gallon of gin and two packs of cigarettes. The others, Garrett, her sister, and Red had already been drinking. Petitioner said he did not buy any crack cocaine and there were no drug dealers living at his house. App. 143, ll. 1-21.

Petitioner Toomer recalled that he was lying on his bed when Wanda Garrett came in and told him the decedent "fell off the porch." App. 144, ll. 1-22. Petitioner went and checked on the decedent and "I figured he was just drunk . . . I just figured he was going to sleep it off and get up." Petitioner therefore did not take any action. App. 145, ll. 2-17.

Petitioner denied that he kept a stick in his window, and he said he did not hit the decedent. App. 149, ll. 1-21.

In his closing argument, the solicitor told the jury that petitioner hit the decedent because he was jealous of her being with Tucker. "[W]e may look at Wanda Garrett and we may say, `who in the world would want that crack-smoking Wanda Garrett,'" but she maintained that was petitioner's motivation to hit Tucker." App. 167, ll. 15-23.

ARGUMENT

1.

The PCR Court erred by ruling defense counsel preserved the issue of whether Wanda Garrett's testimony that petitioner had hit her with a stick on a prior occasion or occasions was admissible under the prior bad act exception where the Court of Appeals held the issue was not preserved for appellate review, and the PCR court also erred by finding a lack of prejudice because this prior bad act was admissible evidence anyway

Relevant Facts

The Court of Appeals procedurally barred this issue on direct appeal because it could not determine on what basis the judge ruled the testimony was admissible, and finding the appellant (petitioner) had the duty to make a record the appellate court could adequately review. Supp. App. 1-3. Petitioner filed an application for post conviction relief on August 28, 2012. App. 188 – 194. He alleged counsel was ineffective for failing to "properly" object to the trial judge's admission of the other bad acts evidence. App. 190. The state filed a return to this application dated December 13, 2012. App. 195 – 199.

An evidentiary hearing was convened on December 18, 2013, before the Honorable Stephen H. John. Randall Mullins and Jarrod Owenby represented petitioner. Assistant Attorney General Joshua L. Thomas represented the state. App. p. 200.

Defense Counsel James Galmore testified that state's star witness, Wanda Garrett, was a frequent public defender client in Horry County, and that she had eleven or twelve aliases. App. p. 212, l. 15 – 213, l. 9. Galmore remembered his objection to the testimony of Wanda Garrett about petitioner having hit her with the stick or pipe on prior occasions.

He recalled the bench conference with the trial judge about that testimony. App. 228, ll. 11 – 21; App. 229, ll. 13 – 22.

Galmore said he was familiar with the State v. Lyle 125 S.C.406, 118 S.E.803 (1923,) exceptions to other bad act evidence being inadmissible. Galmore said he did not think Garrett's testimony was admissible under the common schemer plan exception. App. 230, ll. 2- - 15. Galmore also said he did not think testimony was admissible as part of the res gestae. Galmore acknowledged he did not properly preserve this issue for appeal with his objection, and he said he understood the Court of Appeals procedurally barred the issue. App. 231, l. 21 – 232, l. 6.

The PCR judge at this point interjected and asked Galmore if he objected under rule 404 (b), SCRE. Galmore answered that was his trial objection. The judge then said, "Despite what the Court of Appeals may say, the trial judge had it in front of him exactly what your objection was?" Galmore answered, "Yes sir." App. 233, ll. 7-10.

In his order of dismissal, the PCR Court wrote that trial counsel clearly stated he was objecting to the introduction of Garrett's testimony about the stick under Rule 404 (b), SCRE. The judge found that the trial judge heard the arguments at the bench conference before allowing the testimony in over objection, and he found trial counsel was not deficient. App. 269.

The PCR Court also found that Garrett's testimony that petitioner had hit her with the stick on prior occasions was admissible to show he did not accidentally or mistakenly hit the victim, and to show that he commonly used this stick as a weapon. Therefore, the PCR judge ruled the trial judge properly admitted Garrett's testimony over trial counsel's Rule 404 (b), SCRE exceptions. App. 269, l. 27.

In his Rule 59 (e), SCRCP motion, petitioner argued the Court of Appeals found this issue was not properly preserved and thus it was not available for Appellate review. The motion also argued that the PCR judge was incorrect in ruling Garrett's testimony about petitioner's alleged use of the stick on a prior occasion(s) was admissible to "prove identity absence of mistake or accident, as the State attempted to argue." App. 275 – 276. The motion also pointed out if the evidence was offered to show lack of mistake or accident the proffer was insufficient because the alleged victim in this case was not Garrett. App. 276.

In his order denying the motion for reconsideration, the PCR court again ruled that trial counsel was not ineffective in making his objection to the admission of this evidence. The order acknowledged the fact that it was aware the Court of Appeals found the issue not preserved for appellate review, but nonetheless found trial counsel's representation was not deficient. App. 281 – 283.

Discussion

The Court of Appeals procedurally barred the State v. Lyle issue on direct appeal. Supp. App. 2-3. That ruling was law of the case, and the PCR Court was not free to disregard it and find that the issue was preserved by defense counsel. Based on its own finding that the issue was preserved by defense counsel, the PCR Court ruled defense counsel's performance was not deficient.

This ruling was fundamentally unfair to petitioner. The issue was not addressed on direct appeal because the Court of Appeals found it procedurally barred. Petitioner's argument from there is obviously that defense counsel was deficient for not preserving the issue, and that he would have won his direct appeal had the issue been preserved.

By finding defense counsel properly preserved the issue despite the holding of the Court of Appeals that he did not, the PCR Court has left petitioner without a remedy for the admission of this highly prejudicial inadmissible evidence that petitioner has beaten Garrett on prior occasions with a stick.

The PCR Court also erred by finding this testimony that petitioner had hit Garrett on a prior occasion(s) with the stick was admissible evidence. As PCR counsel properly pointed out, petitioner did not hit Garrett with this stick, he allegedly hit the victim in this case with the stick. This testimony was not admissible as part of a common scheme or plan or to show lack of accident or lack of mistake.

Petitioner argued on direct appeal that Garrett's testimony was improperly admitted under Rule 404 (b), SCRE because it was not admissible under any exception to State v. Lyle. See Brief of Appellant at 5–11 Supp. App. 7-14. Petitioner argued in his brief direct appeal "the purpose of not allowing such evidence of a prior bad act is the jury can impermissibly use propensity evidence to conclude the defendant was just once again acting in conformity with a character trait." Final Brief of Appellant at 9.; Supp.App. 13.

Petitioner argued this case was a swearing contest between Garrett and himself and that Garrett's credibility was very shaky since she was a homeless crack addict before petitioner had allowed her into his home. It was apparent that Garrett's testimony that petitioner had hit her with the stick on prior occasions was extremely prejudicial. the Court disagreed with the Court of Appeals and found that defense Galmore properly preserved the issue for appeal, where the Court of Appeals found the issue was procedurally barred. Petitioner should not be without a remedy in this situation. Petitioner submits that if the Court of Appeals had reached the merits of the issue it would have found error on the part of

the trial judge, and reversed petitioner's convictions. Since this inadmissible testimony was undoubtedly highly prejudicial, and the Court of Appeals found defense counsel did not preserve the issue for appellate review, petitioner should be granted a new trial.

2.

Defense counsel was ineffective for failing to request a jury instruction on voluntary manslaughter where he testified he believed if he had requested this instruction, the jury would have convicted petitioner of voluntary manslaughter, and where there was no evidence to support the PCR court's ruling that defense counsel discussed his alleged "all or nothing strategy" strategy with petitioner.

Defense counsel Galmore testified that the state made a plea offer that petitioner could plead guilty to voluntary manslaughter in return for a recommendation of a sentence of twenty-five years imprisonment. App. 220, l. 9 – 223, l. 9. Defense counsel candidly testified, "I should have asked for voluntary manslaughter charge." App. p. 236 ll. 14-18.

Trial counsel testified he discussed the elements of voluntary manslaughter with petitioner when the plea offer was made, but he did **not** discuss voluntary manslaughter as an alternative charge or verdict option with petitioner **at trial**. Defense counsel said if he had requested a voluntary manslaughter instruction he thought the jury "probably would have considered it and convicted him of it." App. p. 244, ll. 11. 7-22.

Galmore testified there was evidence of the heat of passion because of the "love triangle" at the time petitioner allegedly hit the decedent with the stick. Although defense counsel did not discuss a voluntary manslaughter instruction with petitioner, he told the Assistant Attorney General at the PCR hearing that he was going for "an all or nothing approach," meaning either petitioner would be convicted of murder or he would be acquitted. App. 244, ll. 7-22.

In the order of dismissal, the PCR Court wrote that "trial counsel candidly admitted Garrett's story supported a voluntary manslaughter instruction. The judge wrote that trial

counsel acknowledged petitioner's version of events, that he did not hit the decedent, did not support a voluntary manslaughter instruction. App. 267. Garrett's story conversely did support a voluntary manslaughter instruction. The PCR Court found that defense counsel discussed with petitioner the possibility of "seeking a jury instruction on murder, and omitting the manslaughter instruction. He also recalled discussing with applicant the elements of voluntary manslaughter; however, *they ultimately decided the best strategy was to attempt to convince the jury applicant did not kill the victim.*" App. 267. (emphasis added). The PCR court found this "all or nothing" strategy was legitimate. App. p. 270.

Discussion

There is no evidence to support the PCR Court's ruling that defense counsel discussed requesting a voluntary manslaughter instruction with petitioner, and they agreed to adopt an "all or nothing" strategy. See Cherry v. State, 300, S.C.115, 386S.E.2d 624 (1984.). A fair of defense counsel's testimony is that he thought if he requested a voluntary manslaughter instruction, petitioner would have been found guilty of voluntary manslaughter. If defense counsel adopted an "all or nothing" strategy, he did so without discussing the matter with petitioner. Since defense counsel testified he thought there was evidence of voluntary manslaughter, and he also thought petitioner would have been convicted of voluntary manslaughter if he requested that jury charge and verdict option, it would seem to follow that the *waiver of that lesser verdict option should have been discussed with petitioner.*

This case did involve a love triangle and Garrett's testimony shows that she believed petitioner overheard her and the decedent discussing leaving petitioner's house and moving in together. There was clearly an altercation between Garrett and the petitioner and the

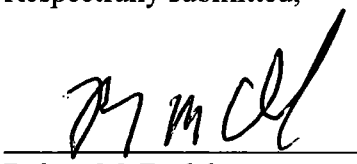
decedent during this heated moment if Garrett's testimony is credited, which it must be under the "any evidence whatsoever standard," wherein she claimed that petitioner hit the decedent with stick or pipe. There was evidence to support the submission of a voluntary manslaughter instruction in this case based upon the heat of passion and the sufficient legal provocation. See State v. Knoten 347 S.C.296, 555, S.E.2d 391 (2001.)

Because the PCR Court's ruling that defense counsel discussed a voluntary manslaughter with petitioner and chose to adopt an "all or nothing strategy" is without any evidentiary support, it should be reversed by this Court. See Cherry v. State 300, S.C.115, 386S.E.2d 624 (1984.).

CONCLUSION

For reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2014.

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TOMMY TOOMER,

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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 and supplemental appendix in this case have been served on Joshua L. Thomas, Esquire Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of December, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.