

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

S.C. Supreme Court

BRIAN W. STURGEON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-001836

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in negatively attacking petitioner's character during opening arguments by revealing prior bad act information via comments such as "[petitioner] and state's witness William Hembree were running from the law" and that they "had outstanding warrants on them" at the time the crimes occurred because these remarks were improper and prejudicial, and even described by the PCR judge as arguably "inadvisable," particularly since there was no overwhelming evidence presented against petitioner at trial.

STATEMENT

Petitioner Brian W. Sturgeon was convicted of assault and battery with intent to kill, voluntary manslaughter, and kidnapping during the March 2010 term of the Greenville County General Sessions Court before Judge Edward W. Miller. Petitioner was sentenced to an aggregate prison sentence of forty-five years. App. 1-219. Everett P. Godfrey represented petitioner at trial, and Assistant Solicitor Sylvia P. Harrison appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed on appeal. See State v. Sturgeon, Op. No. 2011-UP-531 (S.C. Ct. of Appeals filed Dec. 2, 2010). Joseph L. Savitz represented petitioner on direct appeal.

On May 31, 2012, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 221-252. The respondent filed a return dated August 31, 2012, requesting that a PCR hearing be held in response to petitioner's PCR action. App. 253-057. A PCR hearing was convened on June 18, 2014, at the Greenville County Courthouse before Judge Robin B. Stilwell. Petitioner was present at the hearing and represented by Rodney Richey, and Assistant Attorney General Karen C. Ratigan appeared on behalf of the state. App. 259-282.

On August 1, 2014, Judge Stilwell issued an Order of Dismissal therein denying all of petitioner's allegations of ineffective assistance of counsel raised in the case. App. 284-294.

Petitioner appealed Judge Stilwell's Order of Dismissal. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel erred in negatively attacking petitioner's character during opening arguments by referencing prior bad acts on his (petitioner's) behalf via comments such as "[petitioner] and state's witness William Hembree were running from the law "and that they "had outstanding warrants on them." at the time the crimes occurred because these remarks were improper and prejudicial, and even described by the PCR judge as arguable "inadvisable." particularly since there was no overwhelming evidence presented against petitioner at trial.

This case involved multiple shootings inside a vehicle that contained three individuals: petitioner, state's witness William Hembree, and Jandie Finley. Since Finley died from a gunshot wound to the head, the only two eyewitnesses to the shootings were petitioner and state's witness Hembree, both of whom testified at trial.

State's witness William Hembree testified that he, petitioner, and Finley were inside a parked car in front of a friend's apartment in Greenville on the early morning hours of December 2, 2007. Hembree stated that at that time, petitioner kept insisting that he needed a car. Hembree stated that he was sitting behind the driver's wheel and that Finley was beside him in the passenger seat. Hembree explained that at some point, he "[came to]" and realized that he had been shot in his ear and that petitioner had a gun. Then, Hembree saw petitioner drive away in the car while Finley was still inside the car. App. 42, 1.5-p.52, 1.12, App. 61, 1.23-p. 621.1. The autopsy results from an examination of Finley's body, which was found off Blue Ridge Drive in Greenville, revealed that she died of a gunshot wound to her head. App. 124, 1.4-p.125, 1.13; App. 80, 1.21-p.81, 1.20.

Petitioner testified in his defense at trial. Petitioner testified that on that night in question, he was sitting in the passenger seat, and that Finley was in the back, and that Hembree was at the driver's wheel. Petitioner explained that while he and Hembree were arguing, Hembree tried to

shoot him. Petitioner stated that he heard a “pow” and that he responded by grabbing Hembree’s hand and that he “guessed it went to the back seat” because he was not sure how Finlay got shot. Petitioner stated that he started hitting Hembree and that “the gun went off again,” so he (petitioner) put both hands on the gun and spun it around.” Petitioner added that he drove off without Hembree and later pulled Finley’s body out of the car. App. 147, 1.6-p.150, 1.7.

During the PCR hearing, petitioner testified that trial counsel erred in effect by negatively attacking his character during opening statements by suggesting that he (petitioner) was connected to certain prior bad acts/crimes and that this in effect prejudiced his case at the outset. App. 265, 1.24 – p. 266, 1. 4.

Trial counsel testified during the PCR hearing and explained in effect that “everybody out there had a history with guns” and that “there was a fight over the gun... [and] a number of shots [were] fired from the gun [while] both guys were fighting over the gun.” App. 281, 1. 2-12; App. 276, lines 2-4.

The PCR judge ruled that petitioner “failed to meet his burden of proving trial counsel put his character [at issue] during [the] opening statements,” and that “even assuming arguendo that this statement was inadvisable, [petitioner did not] prove any resulting prejudice because of the overwhelming evidence of guilt.” App. 291.

Prior bad acts evidence is inadmissible to show that the accused is a bad person or has the propensity to commit the crime charged against him. State v. Smith, 309 S.C. 409, 419 S.E. 2d 816 (1992); State v. Peake, 302 S.C. 378, 316 S.E. 2d 302 (1990); State v. Martucci, 380 S.C. 232, 669 S.E. 2d 598 (2008).

Trial counsel's opening comments in question follow:

[Petitioner] is going to testify in his own defense... basically there are two people in the world who know exactly what happened when the shots were fired: [petitioner] and Hembree. Both [petitioner] and Hembree were running from the law at the time. They had outstanding warrants. This case is going to bring you to a section of life in society that most people don't see. App. 31, lines 18-22.

Clearly, trial counsel's opening statements in this regard put the jury on notice that petitioner previously committed what sounded like numerous and multiple prior criminal offenses, which were authenticated by legal warrants. The inference surely drawn by the jury was that petitioner was probably guilty of the crimes for which he was on trial also because he was certainly predisposed to commit crimes. Additionally, counsel's statements made it clear that petitioner was criminally linked to Hembree, which suggests that they were apparently partners in criminal ventures, and furthermore that petitioner was certainly guilty of the charges for which he was on trial. Again, this implied that petitioner and Hembree were more than likely complicit in numerous crimes, including the offenses charged against petitioner in this case.

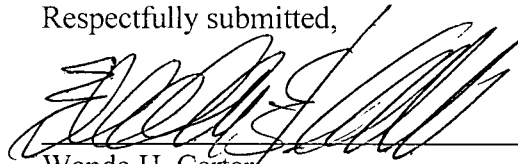
Petitioner was prejudiced by trial counsel's prior bad acts opening argument because contrary to the PCR judge's finding that there was no prejudice that resulted from counsel's admitted "inadvisable" remarks in question, clearly this was prejudicial, and clearly there was no overwhelming evidence presented by the state where only one eyewitness in the case (William Hembree) pointed to petitioner as the perpetrator while petitioner in turn pointed to Hembree as the perpetrator. The case boiled down to a swearing contest between the credibility of petitioner, who stated that Hembree fired gun shots, and the credibility of Hembree, who stated that petitioner fired gunshots.

Therefore, the negative character statements made by counsel prejudiced petitioner's case. This constituted an error that deprived petitioner of his right to a fair trial, which in turn meant that trial counsel rendered deficient performance as petitioner's attorney that was well below the standard of competence demanded of criminal attorneys in violation of petitioner's Sixth Amendment right to receipt of effective assistance of counsel at trial. See Strickland v. Washington 466 U.S. 668 (1984). Finally, but for counsel's ineffective assistance as outlined above, a reasonable likelihood exists that petitioner's trial might have ended differently.

CONCLUSION

Based on the foregoing argument, petitioner would request that this Court grant the petition and allow full briefing 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 20th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

BRIAN W. STURGEON,

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V.

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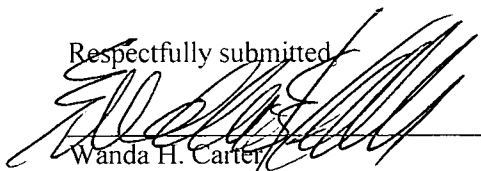
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian W. Sturgeon states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 18, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Brian W. Sturgeon.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of April, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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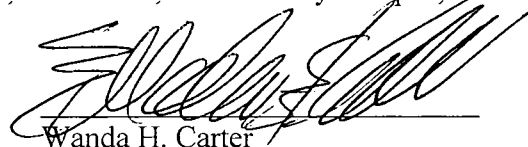
V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Brian W. Sturgeon, #316514, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of April, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of April, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.