ORIGINAL

RECEIVED
APR 29 2015
S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

CHRISTOPHER COMMANDER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002690

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

ISSUE PRESENTED

Whether defense counsel was ineffective in failing to object to witness John Presley introducing evidence of a prior bad act of petitioner's which was a prior domestic violence charge against the victim?

STATEMENT

Petitioner was convicted of murder after a jury trial held before the Hon. James W. Johnson, Jr. on October 10-16, 2006, in Richland County. A sentence of life imprisonment without the possibility of parole was imposed. Doug Strickler, Esq. and Lauren Mobley, Esq. represented petitioner. John P. Meadows, Esq. and K. Luck Campbell, Esq. were the assistant solicitors. (App. p. 1-p. 930). Petitioner appealed his conviction and it was affirmed by the Court of Appeals on June 11, 2009. State v. Commander, Op. No. 27062. (App. p. 939).

Petitioner filed an application for post-conviction relief on June 1, 2012. (App. p. 936- p. 937) Respondent filed a return dated June 25, 2012. (App. p. 938- p. 944). An evidentiary hearing was held on September 2, 2014, before the Hon. Robert E. Hood. Petitioner was present and was represented by Kristy Goldberg, Esq. Respondent was represented by Suzanne White, Assistant Attorney General. Petitioner, Kimberly Collins, and Doug Strickler testified at the hearing. (App. p. 945- p. 1036). On December 5, 2014, Judge Hood issued an order denying and dismissing the application for post-conviction relief. (App. p. 1037- p. 1057)

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to object to witness John Presley introducing evidence of a prior bad act of petitioner's which was a prior domestic violence charge against the victim.

Petitioner was tried for the murder of the victim. The victim and petitioner "worked together, lived together, and shared an intimate relationship,.. Petitioner fathered the victim's "unborn child." The victim "tried to end the relationship shortly before she disappeared." State v. Commander, 396 S.C. 254, 258, 721 S.E.2d 413, 415 (2011). The case against petitioner was largely circumstantial. During the trial, the assistant solicitor called John Presley to testify. He was housed with petitioner at Alvin S. Glenn Detention Center. (App. p. 596, line 7 - p. 597, line 4). Petitioner told him that he and the victim had constant fights. (App. p. 600, lines 7-9). Later, Presley said petitioner told him that they had fights and the victim would lash out at him. "And one time he hit her, that he was arrested for domestic violence, and that she later dropped the charges and they discharged him, they released him." (App. p. 608, lines 2-7).

At no time did defense counsel object to this line of questioning. At the evidentiary hearing he admitted that he should have objected to the improper charter evidence. (App. p. 997, line 12- p. 998, line).

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v.

State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches.

In Mitchell v. State, *298 S.C. 186, 379 S.E.2d 123 (1989).* the Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. *State v. McElveen*, 280, S.C. 325, 313 S.E.2d 298 (1984); *State v. Swords*, 279 S.C. 554, 309 S.E.2d 750 (1983); S*tate v. Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

> It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. *See, United States v. Johnson*, 610 F.2d 194 (4th Cir.1979); *State v. Byers*, 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *See, State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the

> prerequisite that they establish some element, i.e., intent or motive, of the crime charged. *See, e.g.., State v. Lyle, supra*; *State v. South,* 285 S.C. 529, 331 S.E.2d 775 (1985); and *State v. Huggins,* 285 S.C. 361, 329 S.E.2d 759 (1985

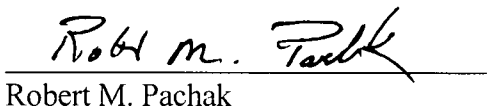
293 S.C. at 324-325, 360 S.E.2d at 319.

Credibility was a key issue in this case. In State v. Reeves, 301 S.C. 191, 391 S.E. 2d 241 (1990), the Court held that "error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense."

CONCLUSION

Petitioner's writ should be granted and his conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
ROBERT E. HOOD, CIRCUIT COURT JUDGE

CHRISTOPHER COMMANDER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Commander states:

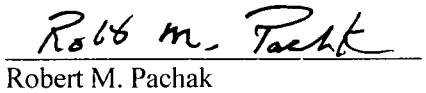
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 2, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He 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 him as counsel for Christopher Commander.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of April, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

CHRISTOPHER COMMANDER,

PETITIONER,

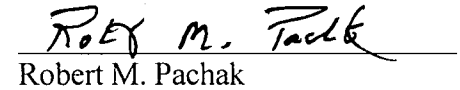
V.

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 Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Christopher Commander, #318173, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of April, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of April, 2015.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.