

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County
James R. Barber, III, Circuit Court Judge

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JUN 29 2015

S.C. Supreme Court

REGINALD A. NANCE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002302

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in eliciting testimony from a police officer about information referencing petitioner's involvement in an additional burglary and another grand larceny that were arguably crimes unrelated to the burglary and grand larceny charges for which petitioner was on trial because this opened the door for the jury to consider prejudicial prior bad acts evidence in the case, which in turn violated petitioner's right to a fair trial.

STATEMENT

Petitioner Reginald A. Nance was convicted of grand larceny, petit larceny, possession of a weapon during the commission of a crime, malicious injury to real property, and two counts of second degree burglary per a jury trial held during the April 2010 term of the Pickens County General Sessions Court before Judge Edward G. Welmaker. Petitioner was sentenced to imprisonment for an aggregate prison term of twenty-seven years on his convictions. App. 1 – 803. Petitioner was represented by John Dejong at trial, and Assistant Solicitor Jenny Hamaker appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed on appeal. See State v. Nance, Op. No. 2013-UP-215 (S.C. Ct. App. filed May 22, 2013). Petitioner was represented on direct appeal by Tristan M. Shaffer, formerly of the South Carolina Office of Indigent Defense.

On June 19, 2013, petitioner filed a PCR application with the Pickens County Office of the Clerk of Court. App. 805 – 812. The respondent filed a return dated December 3, 2013, requesting that a PCR hearing be held in the case. App. 813- 817.

A PCR hearing was convened on August 25, 2014, at the Pickens County Courthouse before Judge James R. Barber. App. 819 – 869. On September 24, 2014, Judge Barber issued an Order of Dismissal therein denying the allegations of ineffective assistance of counsel raised by petitioner. App. 871- 879.

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

ARGUMENT

Trial counsel erred in eliciting testimony from a police officer about information referencing petitioner's involvement in an additional burglary and another grand larceny that were arguably crimes unrelated to the burglary and grand larceny charges for which petitioner was on trial because this opened the door for the jury to consider prejudicial prior bad acts evidence in the case, which in turn violated petitioner's right to a fair trial.

RELEVANT TRIAL TESTIMONY

At trial, Officers Corey Baker and John Berghold testified that on the night of January 27, 2009, they were dispatched to a building facing Highway 8 in Pickens County that contained a Tobacco Warehouse Store and a Cash Advance Store. Both Officers testified that upon arriving at the scene, they saw that the back doors of the Tobacco Warehouse Store had been forced upon, and that the walls leading to the adjacent Cash Advance Store had been damaged to gain entry inside. Also, both police officers testified that there was a vehicle parked behind both stores that was still running. The vehicle was described by the officers as a blue Mercury Sable automobile. App. 75, l. 17 – App. 84, l. 18; App. 101, l. 22 – App. 109, l. 16.

Automobile dealer James Wilson testified that he sold petitioner a 1999 blue Mercury Sable on January 27, 2009, from his Greenville car lot and that this particular Mercury Sable looked similar to a Ford Taurus. App.125, l. 7 – p.130, l. 1. Wilson testified that a lady was present with petitioner on the date that car was sold to him. App. 130, l. 2 – 20. Trisha Brown testified that she went to a Greenville car dealership with petitioner on January 27, 2009, and that petitioner bought that car for her. App. 339, l. 17 – p. 348, l. 17.

Police Officer Tony Robinson stated that he arrived at the buildings that were entered on the night of January 27, 2009, and recovered items from inside the Mercury Sable that was left behind

and running at the scene. Officer Robinson found South Carolina driver's license cards for Johnny Parks and petitioner and other cards bearing both their names. Thereafter, Johnny Parks and petitioner were arrested as suspects. Also, Officer Robinson found in the car the bill of sale dated January 27, 2009 that was made out to petitioner as the buyer of the Mercury Sable. App. 214, l. 23 – App. 234, l. 12.

Co-defendant Johnny Parks testified at trial as a state's witness. Parks explained that petitioner was driving the vehicle he bought for Tisha Brown on the night in question and picked him up around 7 am on January 27, 2009. Parks added that petitioner drove to the Cash Advance Store building in question and that he (Parks) had to pry open the doors at the back of the Tobacco Warehouse located next door to gain entry inside that building. Parks stated that they both went in and started picking up things like cigarettes and just little things such as a portable television from the Cash Advance Store. Then, when police arrived on the scene while they were still inside the stores, they both fled on foot and abandoned the vehicle they drove for transportation. Parks claimed that they continued walking to escape. App. 476, l. 4 – p. 512, l. 6.

Hence, these were the only facts needed to prosecute the case based on the charges filed against petitioner.

Note that petitioner testified in his defense at trial claiming that he was not in the company of Johnny Parks when the events behind the Tobacco Warehouse Store and Cash Advance Store transpired and that the Mercury Sable was reported stolen anyway. App. 604, l. 18 – p. 649, l. 24.

IRRELEVANT AND PREJUDICIAL TRIAL TESTIMONY

The vehicle petitioner drove on the night in question, which was bought by petitioner for Tisha Brown, was apparently similar in appearance to a Ford Taurus vehicle. As a matter of fact, Tisha Brown referred to the vehicle petitioner purchased for her as a Ford Taurus (blue in color).

App. 344, l. 4 – 13. Also, the car salesman who sold the Mercury Sable to petitioner admitted that the vehicle looked like a Ford Taurus. App. 128, l. 11 – 15.

As a result of the vehicle model confusion, defense counsel attempted to poke holes in the state's case by attacking the credibility of police officer Lane Byers, who testified that he tracked down the automobile found at the crime scene as a vehicle purchased by petitioner from a car dealership in Greenville. Defense counsel's plan of obfuscation went forth via questions designed to confuse Byers or show that Byers was confused as follows:

Q. And wasn't there some confusion over that car and perhaps a Ford Taurus that had been stolen on the night of the 27th (Jan, 2009) or the morning of the 28 (Jan 2009) in Pickens County?

A. I had no confusion over it...I was tracking that car sitting behind Cash Advance.....this blue Sable that was sitting behind Cash Advance. App. 445, lines 11 – 20.

However, the fatal result was that this opened the door for the jury to hear about an additional act of burglary and another act of grand larceny committed by co-defendant Parks and petitioner after they fled on foot from the Cash Advance and Tobacco Warehouse stores on that night. Due to this open door made possible by defense counsel, the state was able to present testimony to the effect that while Parks and petitioner were fleeing from the Tobacco Warehouse and Cash Advance Stores, they broke into Tri-City Body Shop also located on Highway 8 and stole a 1998 Ford Taurus from that lot in order to continue their escape from the crime scene and ultimately find their way home. The solicitor called to the witness stand police officer Michael Baker, who testified that a 1998 silver Ford Taurus was stolen from Tri-City Body Shop located on Highway 8 on the morning of January 28, 2009, and that said vehicle was recovered on February 10, 2009. App. 473, l. 4 – p. 475, l. 9. Although defense counsel objected to Officer Baker's testimony, the trial judge allowed his testimony into evidence after the solicitor argued that "on

cross examination of [Officer Byers, defense counsel] brought to the attention of the jury that there was a vehicle stolen that night that was a Ford Taurus.” App. 470, l. 11 – p. 472, l. 16. Then, the following witness, who was co-defendant Johnny Parks, stated that while fleeing from the scene they “kicked the window” out of a car body shop, which was Tri-City Body Shop, and found the keys that started the Ford Taurus sitting parked on the lot and drove off. App. 512, l. 13 – p. 514, l. 13.

During the PCR hearing, petitioner testified that counsel erred at trial by introducing the Tri-City Body Shop burglary and grand larceny in the case via the cross examination of Officer Byers because this in effect raised the question of whether petitioner was involved in prior bad acts for which he had not been charged. App. 831, l. 1 – App. 837, l. 25. Petitioner complained that defense counsel “opened the door for this testimony (regarding subsequent activities at Tri-City Body Shop) to even be brought forth.” App. 838, lines 2 – 12; App. 839, lines 4 – 18.

Counsel’s opening the door to prior bad acts evidence against petitioner was exacerbated by the fact that the solicitor improperly bolstered co-defendant Park’s testimony during her closing argument by referring to the fact that co-defendant Parks admitted that he and petitioner committed the Tri-City Body Shop break-in when he did not have to do so. App. 758, l. 7 – 13. In fact, the solicitor’s argument regarding this matter follows:

The reason why [defense counsel] didn’t catch Mr. Parks in any lies, is because Mr. Parks was telling the truth. You cannot change the truth...Why would Mr. Parks come in here and tell you about a crime [at Tri-City Body Shop] that the sheriff’s office doesn’t know who committed it. No charges have been pressed against anybody for [the crimes from Tri-City Body Shop]. Mr. Parks...came up here on the witness stand told you he broke into an automobile body shop and stole a car. He did not have to tell you that. He did not have to confess to that. App. 757, l. 23 – App. 758, l. 14.

Trial counsel testified at the PCR hearing and admitted that he “guess[ed] it [was] possible that he opened the door” on petitioner’s alleged subsequent burglary and grand larceny crimes, but that this was going to come out during Parks’ testimony nonetheless. App. 868, l. 11 – App. 869, l.

6. Trial counsel explained as follows:

Q. Okay. And [petitioner] has also brought up the issue he believes that you opened the door during cross examination to have the jury know that he had been involved in a second burglary. Do you recall any of that?

A. Yes ma’am. To answer your question directly, I recall that [petitioner’s] testimony, that’s what’s leading me to believe, again, that there was something on that vehicle that was recovered in Laurens County that came in pretty much late after – did not come with the original discovery, shall we say. And then when it did, it was not really clear on what, if any, evidence they had on that. So, yes, I did go into that. Not to show that he had committed another crime, but certainly to try to get away from this particular crime. And again, that’s why Parks then testified that that vehicle was stone on Highway – I want to say Highway 8, but I’m not sure about that. App. 862, l. 23 – p. 863, l. 15.

The PCR judge ruled that petitioner failed to meet his burden of proving that trial counsel erred in opening the door to “damaging” testimony and that prejudice resulted because “trial counsel used a valid trial tactic in asking Byers whether there was confusion about the stolen vehicle, as this could have created uncertainty about this facts of the state’s case,” and in effect that this information would have surfaced ultimately via co-defendant Parks’ testimony. App. 876 – 877.

TRIAL COUNSEL’S ERROR

Clearly, creating an opportunity for the state to present prior bad acts evidence against petitioner regarding crimes that were identical to the crimes for which petitioner was being tried constituted egregious error.

Evidence of prior bad acts is inadmissible to show that the accused is a bad person or has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Also, even if prior crimes are considered under the Lyle¹ exceptions; nonetheless, the value of the priors must outweigh the prejudicial value, i.e., the prior crimes cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, the danger of prejudice is enhanced when the prior crimes or bad acts are similar to the crime for which the defendant is on trial. State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). There is heightened prejudice in admitting prior crimes that are similar to the one for which the accused is on trial. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2007); State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). Admitting priors similar to the crime for which the defendant is on trial would constitute evidence that is more prejudicial than probative because would suggest that the defendant had the propensity to commit the crime charged against him. State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992).

Undoubtedly, the information about petitioner's having committed prior acts of burglary and grand larceny surely led the jurors to believe that petitioner was a serial burglar and thief, and thus certainly guilty of the two burglary charges and two grand larceny charges for which he was on trial. The prior bad acts evidence presented to the jury sealed petitioner's fate.

PREJUDICE DUE TO TRIAL COUNSEL'S ERROR

Trial counsel's error cannot be hidden under the cover of trial strategy because the prior bad acts evidence resulted in harmless error, and also this could not be reviewed on appeal because

¹ Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

counsel opened the door to the same. In State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003), the Court held that it cannot review error in which counsel opened the door on. Also, error is not harmless if it contributed to the jury verdict or affected the result of the trial. Mitchell v. State, 286 S.C. 572, 336 S.E.2d 150 (1985). Here, after hearing that minutes after the first two burglaries and two grand larcenies occurred, petitioner and Parks went on to engage in a third burglary and third grand larceny, it is untenable to believe that the jury would not have been processed this information as the last nail in the coffin and translated the same via guilty as charged verdicts in the case at bar.

SUMMARY

In conclusion, trial counsel's error in opening the door to prior bad acts evidence constituted deficient representation of petitioner at his criminal trial; and but for the error, a reasonable probability exists that the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 668 (1984). Thus, petitioner's Sixth Amendment right to effective assistance of counsel during his criminal case was violated due to counsel's deficient legal representation outlined in this petition.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,


Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of June, 2015.

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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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Reginald Antonio Nance #275742, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 29th day of June, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.