STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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

PETITION FOR WRIT OF CERTIORARI

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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)

A Johnson petition for writ of certiorari was filed with the Court on April 29, 2015. On July 24, 2015, this Court issued and order directing the parties to address the issue that was already raised in the petition.

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.

In the published opinion on this case this Court further wrote:

> A police investigation revealed (and numerous trial witnesses attested) that Petitioner stole Victim's purse, mobile telephone, and vehicle from her home, sent text messages from Victim's phone to her family members in which Petitioner pretended to be Victim alive and on vacation, withdrew money from her bank account, used her credit cards, made calls on Victim's behalf from her mobile telephone, and used that telephone number as a contact number for a telephone chat line.
>
> At the time of his arrest in New Orleans, Louisiana, Petitioner possessed Victim's vehicle. After police officers gained entry into his hotel room, Petitioner admitted killing Victim. The arresting officers recovered items from Petitioner's hotel room that connected Petitioner to Victim, including her checkbook, driver's license, birth certificate, ultrasound image, OB-GYN appointment card, a medical slip bearing her name, car keys, and keys to another vehicle that police located in Victim's driveway.

396 S.C. at257-258, 721 S.E.2d at 415 (footnote deleted)

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 5).

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."

The PCR court found that counsel was deficient in failing to object to the prior bad act but it could not find prejudice. (App. p. 1047- p. 1049) But the case cited above says that it is prejudicial. The solicitor brought up the prior bad act in closing argument. (App. p. 857, lines 8-14) The trial court gave a charge on the prior records of a witness or witnesses. (App. p. 803, lines 1-19) But it

did not give a limiting charge on petitioner's prior bad act. See, State v. Timmons, 327 S.C. 48, 448 S.E.2d 323 (1997). So the jury was free to view the prior bad act as propensity evidence.

The PCR court noticed twice, after two of the six issues that were raised in PCR, that this Court had found on direct appeal that the circumstantial evidence was overwhelming.[1] (App. p. 1046 and App. p. 1052) As to the prior bad act, the PCR court noticed that the circumstantial evidence was also overwhelming. (App. p. 1054- p. 1056) But PCR counsel also raised the issue of the cumulative effect of the errors on the prejudice requirement. (App. p. 1033, line 24- p. 1034, line 12) The PCR court found that the doctrine of cumulative error contradicts the use of the Strickland test.[2] But this Court has found that where counsel's ineffectiveness was so persuasive it will exempt a particularized prejudice analysis. Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988) See, also Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006)

In petitioner's case there were two complained of errors on direct appeal and six issues that were raised in post-conviction relief. At some point with the cumulative effect of all these errors one has to ask if petitioner had a fair trial under all these circumstances. We should be reminded that under Strickland that the standard in proving prejudice is whether there is a reasonable probability that but for counsel's errors, the result of the proceeding would be different. And a "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Defense counsel's failure to object to the introduction of the prior bad act in this case undermined confidence in the outcome of his trial. All the additional errors undermined it even more.

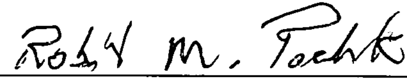
[1] Petitioner did not get the benefit of the circumstantial evidence charge set forth in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013)

[2] See, Rebutting The "Strong Presumption of Reliability"..., 65 S.C. L. Rev. 685 which states that Strickland's language supports a cumulative error analysis.

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari in this case have been served on J. Clayton Mitchell, Esquire at the 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 21st day of August, 2015.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day of August, 2015.

_______________(L.S.)

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