

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Deadra L. Jefferson, Circuit Court Judge

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OCT 19 2015

S.C. Supreme Court

JOHN W. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000820

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 advising petitioner not to testify during his trial on a first degree burglary for fear that his prior burglary convictions would have been used to impeach him because his prior burglary convictions were submitted to the jury during the state's case by stipulation to prove the element of "having committed two or more convictions of burglary," which meant there was no risk of prejudice via an attack on his credibility had he testified at trial, particularly in light of the trial judge's limiting instruction given to the jury regarding how to process the priors in question.

STATEMENT

Petitioner John W. Mack was convicted of first degree burglary and grand larceny per jury trial held during the February 2011 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole. Petitioner was sentenced to life imprisonment on the burglary conviction (LWOP) and five years on the larceny conviction. App. 1 – 169. Roger Poole represented petitioner at trial and Assistant Solicitors Barry J. Barnette and Anthony L. Leibert appeared on behalf of the state. Petitioner appealed, but his appeal was dismissed. See State v. Mack, Op. No. 2013-UP-161 (Ct. App. filed April 17, 2013).

On May 6, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 171-183. The respondent filed a return dated March 18, 2014. App. 184-188. A PCR hearing was held on January 14, 2015, at the Spartanburg County Courthouse before Judge Deadra L. Jefferson. App. 190 – 247. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General Suzanne H. White appeared on behalf of the state.

On April 6, 2015, Judge Jefferson issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 250 – 278.

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

ARGUMENT

Trial counsel erred in advising petitioner not to testify during his trial on a first degree burglary charge for fear that his prior burglary convictions would have been used to impeach him because his prior burglary convictions were submitted to the jury during the state's case by stipulation to prove the element of "having committed two or more convictions of burglary," which meant there was no risk of prejudice via an attack on his credibility had he testified at trial, particularly in light of the trial judge's limiting instruction to the jury regarding how to process the priors in question.

Petitioner was convicted of first degree burglary and grand larceny in this case. The state's case consisted of two components: the testimony from the homeowner whose home had been broken into and a forensic finding that the blood found inside the burglarized home matched petitioner's DNA. At trial, La Rhonda Moss testified that she was in Boone, North Carolina, visiting family and friends over the Labor Day weekend and that she returned to her home in Spartanburg County on September 6, 2005, to find that her home had been burglarized. The burglar took her television, VCR and jewelry. App. 45, l. 20 – p. 51, l. 25. Also, SLED forensic expert Manuel John Ortuno testified that the blood received from the crime scene matched petitioner's blood. App. 87, l. 7 – p. 107, l. 11. The DNA evidence was the only piece of evidence linking petitioner to the charges. Petitioner did not testify at trial and presented no witnesses in his defense.

Before the state closed its case in chief, petitioner's prior burglary record was stipulated to and presented to the jury as follows:

Mr. Leibert: Your Honor, finally, the state and the defense have stipulated the three exhibits. They are State's Exhibit's 4, 5, and 6.

Mr. Leibert: Your Honor, may I publish them to the jury?

The Court: You may.

Mr. Leibert: State's Exhibit 4, ladies and gentlemen, is an indictment, case No. 89-GS-42-2367, the State vs. John Willie Mack, indictment for burglary of a dwelling, wherein Mr. Mack was convicted of burglary in the first degree. State's Exhibit No. 5 is case No. 99-GS-42-0698, an indictment, State vs. John Willie Mack, indictment for burglary second degree, wherein Mr. Mack was convicted of burglary in the second degree. State's Exhibit No 6 is case No. 88-GS-42-1248, the State v. John Willie Mack, indictment for burglary third degree, wherein Mr. Mack was convicted of burglary in the third degree. Thank you...the state rests. App. 115, l. 19 – p. 116, l. 8.

The trial judge gave the following jury instruction in reference to petitioner's burglary priors in relation to the first degree burglary charge for which petitioner was on trial:

Section 16-11-311 provides that a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with the intent to commit a crime therein, and an additional factor, that when in effecting entry or while in the dwelling he is armed with a deadly weapon or causes physical injury to a person who's not a participant in the crime, or uses or threatens the use of a dangerous instrument, or displays what appears to be a knife or firearm, or the entering or the remaining of the burglary occurs in the nighttime, or the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking, or a combination of both. App. 146, l. 19 – p. 147, l. 6.

Now, in this case the state is alleging that the crime of burglary is in the first degree because the burglary was committed by a person with two or more prior convictions for the crime of burglary, and ...you have heard evidence regarding the defendant having previously been convicted of the crime of burglary. You are instructed that such evidence is offered for and may only be considered by your for a very limited purpose...It is not being offered as proof of the defendant's commission of the crime of burglary for which he is now standing trial, nor may it be considered by you as evidence that the defendant did commit the crime of burglary. If you determine that the state has proven beyond a reasonable doubt that the defendant committed the crime of burglary, that is the entering of a dwelling without consent and with the intent to commit a crime therein, then you may consider the evidence of those prior burglary convictions as it relates to the issue as to what degree of burglary has been committed. App. 148, l. 21 – p. 149, l. 23.

During the PCR hearing, petitioner testified that he wanted to get on the stand and explain himself to the jury, but that he was not allowed to do so due to his criminal record. App. 220, l. 18 – p. 221, l. 2. Counsel testified during the PCR hearing and stated that petitioner was “disposed toward not testifying” in effect due to his prior record. App. 231, l. 24 – p. 232, l. 5. In other words, petitioner did not testify presumably based on counsel’s advice not to do so because he would have been impeached with the three burglary priors appearing on his criminal record.

The state had to show at least two prior burglary convictions as an element of the first degree burglary charge for which petitioner was being tried (see State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997)); and since the jury was made aware of his prior burglary record during the state’s case via the parties’ stipulation and the same was published to the jury, then there would have been no risk of credibility damage had petitioner testified, particularly in light of the trial judge’s limiting instruction to the jury regarding these priors. Clearly, the jurors were instructed not to process the priors as bad character evidence. Hence, petitioner would have been able to testify sans fear of prejudicial impeachment, and explain himself with respect to his priors, and with respect to the charge of burglary for which he was on trial at that time. In other words, this was the rare occasion wherein a defendant would have been able to testify notwithstanding the devastating negative impact of the revelation of his criminal record to the jury. Thus, there would have been very little impeachment prejudice petitioner would have suffered had he testified at trial. In addition, petitioner’s testimony could very well have benefited his defense as the state’s evidence presented against him at trial was not overwhelming.

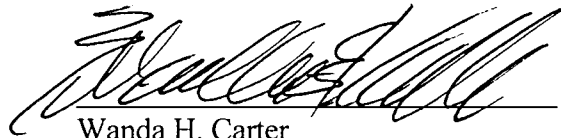
The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. Rock v. Arkansas, 483 U.S. 44 (1987). For example, the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law includes the defendant's right to be heard and offer testimony by presenting himself as a witness. Rock v. Arkansas, *supra*, citing to Faretta v. California, 422 U.S. 806 (1975). Also, as a corollary to the Fifth Amendment's guarantee against compelled testimony, the United States Supreme Court in Harris v. New York, 401 U.S. 222 (1971), held that every defendant is privileged to testify in his own defense or to refuse to do so. Rock v. Arkansas, *supra*. Also, the right to testify is also found in the Sixth Amendment's Compulsory Process Clause, which is guaranteed to the states via the Fourteenth Amendment, and gives the defendant the right to call witnesses in his defense which quite logically includes the right to testify himself should he elect to do so. See Rock v. Arkansas, citing to Washington v. Texas, 388 U.S. 14 (1967), and United States v. Valenzuelo, 458 U.S. 858 (1982).

Here, counsel's error in allowing petitioner to believe that his testimony would have negatively impacted the jury after his prior burglary convictions were revealed constituted deficient legal representation because petitioner's right to testify superseded any prejudice from the exposure of his prior record, especially since the jury was privy to his criminal record anyway after the state submitted the same at trial in order to prove on of the elements of first degree burglary. Counsel's misadvice in this matter violated petitioner's Sixth Amendment right to effective legal assistance at his criminal trial; and but for counsel's error, petitioner would have elected to testify after which the outcome of the case might have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the above raised 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 19th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

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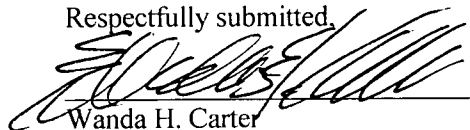
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Willie Mack 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 January 14, 2015. 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 John Willie Mack.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of October, 2015

STATE OF SOUTH CAROLINA

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Certiorari to Spartanburg County

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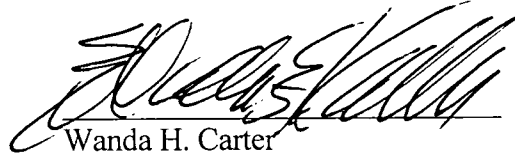
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CERTIFICATE OF SERVICE

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 John Willie Mack, #257219, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 19th day of October, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of October, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.