

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

S.C. Supreme Court

R. Knox McMahon, Circuit Court Judge

DARRIN HOLSTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2015-000666

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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2. Did the PCR judge erred in refusing to find trial counsel ineffective for failing to preserve for appellate review the admission of Petitioner's prior conviction for criminal sexual conduct?

STATEMENT

In December of 2010, the Aiken County Grand Jury indicted Petitioner, Holston, for burglary first degree, attempted armed robbery and kidnapping, indictments #2010-GS-02-1899, 1903, 1905. On May 9, 2012, Petitioner proceeded to jury trial before the Honorable Doyet A. Early, III. Wallis A. Alves represented Petitioner at trial. John W. Weeks and Kevin N. Molony prosecuted the case. The jury returned verdicts of guilty. Judge early imposed three concurrent life sentences. A timely notice of intent to appeal was filed and the direct appeal perfected by Robert M. Pachak with the south Carolina Commission on Indigent Defense. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Holston, No. 2012-UP-678 (S.C.Ct.App. December 28, 2012).

On April 15, 2013, Petitioner filed an application for post conviction relief. The State filed a return on September 5, 2013. An amended application was filed on April 21, 2014. An evidentiary hearing was held on August 1, 2014, before the Honorable R. Knox McMahon. Lance Boozer represented Petitioner at the PCR hearing. Daniel Gourley represented the State. In a written order filed October 9, 2014, Judge McMahon denied relief and dismissed the application. Petitioner filed a Rule 59(e) motion on October 20, 2014, and filed an amended Rule 59(e) motion on November 17, 2014. The State filed a return on November 25, 2014. Judge McMahon denied the Rule 59(e) motion on March 20, 2015. A timely notice of intent to appeal was served on March 30, 2015. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in refusing to find counsel ineffective for calling two of the alleged victim's supervisors from the group home where he worked as witnesses at trial to testify that he falsified information on an accountability log when the supervisors also testified that the alleged victim was a "very good employee and a "wonderful employee" and the alleged victim had already admitted falsifying the accountability log and another witness, also called by the State, testified that the alleged victim received a disciplinary action for falsifying information on the accountability log.

According to the alleged victim, Willie J. Walker, on July 17, 2010, at 2:30 AM while he was working as a residence support provider for Tri Development Center, a home for adults with special needs, Petitioner burst in the door with a gun and wearing only his underwear and a glove. (App. p. 43, lines 9-25; p. 47, line 23 – p. 48, lines 1-21). Walker testified that a second man came in demanding four hundred (\$400.00) dollars. (App. p. 51, line 14 – p. 52, lines 1-9). The second man was wearing blue jeans. (App. p. 87, lines 6-10). According to Walker, Petitioner forced Walker to drive to an ATM to get money and instructed the second man to follow them. (App. p. 52, line 10 – p. 53, 54, lines 1-7). Walker testified that on the way to the ATM he decided to jump out of his, while he was driving, because he knew he did not have four hundred (\$400.00) dollars in the bank. (App. p. 54, lines 9 – 25). After bailing out of his car, Walker ran to some people who were standing outside and asked for help. (App. p. 56, line 14 – p. 57, lines 1-6). His car, with Petitioner inside, ran into a tree. (App. p. 71, lines 19-23). Walker testified that as he was seeking help, the second man pulled up in a white Explorer, went to the wrecked car, returned to the Explorer and drove away. (App. p. 59, lines 15-24). One of the people standing in the yard, William Bryan Salley, testified that he went to check on the car after it crashed into a tree and observed Petitioner inside the car with a gun on his lap. (App. p. 124, line 1 – p. 125, lines 1-13). Salley testified that a black male in a white SUV stopped, went to the crashed car, reached in and grabbed the gun and then left. (App. p. 125, line 21 – p. 126, lines 1-7).

Petitioner, on the other hand, testified that he went to the Tri Development Center to deliver marijuana to Walker and collect four hundred (\$400.00) dollars in payment. Petitioner knocked on the door and Walker let him in. (App. p. 232, lines 17-25). Petitioner testified that he was wearing green slacks, a white, green and black polo top and sandals. (App. p. 235, lines 2-5). While Walker was in the office, Petitioner admitted that he bagged up some cocaine and wore gloves while doing this. (App. p. 235, lines 16-23). Petitioner testified that Walker told him he needed to go to the ATM to get the money. (App. p. 234, lines 4-12). Petitioner got in Walker's car and as Walker drove to the ATM he pulled a pistol and pointed it at Petitioner telling Petitioner to take his clothes off and put the money and "everything" on the clothes. (App. p. 237, lines 1-5). Petitioner complied and then looked up and realized Walker was no longer in the car. (App. p. 237, lines 5-11). Petitioner tried to take the steering wheel but the car wrecked. (App. p. 237, lines 9-10).

During the PCR hearing Petitioner testified that the testimony of two of the alleged victim's supervisors, called as witnesses by trial counsel, improperly bolstered the victim's credibility. (App. p. 504, lines 2 – p. 505, lines 1-14). At trial on cross examination, Renee L. Tyler, one of the alleged victim Willie Walker's supervisors at the Tri-Development Center, testified that Walker was a "very good employee." (App. p. 268, lines 16-17). When asked if she ever had any problems with Walker, Tyler testified, "No problems. He would report to work on time, very seldom call. I can't remember a time he ever called out. Very responsible individual." (App. p. 268, lines 18-21). Another supervisor, Mary R. Sharp, testified that Walker was a "wonderful employee" and welcome to come back anytime he wants to come back. (App. p. 277, lines 5-6).

Trial counsel testified at the PCR hearing that she called the two supervisors to show that Walker falsified documents. (App. p. 541, lines 2-4). Trial counsel testified, "Without putting up

his supervisors, I had no way to show that this man lied on official documents where he was responsible for the care of mentally handicapped people. So if I didn't use the supervisors, I would have had his inconsistent statements, and I wouldn't have been able to put in that document. That's an official form that's required by DHEC to make sure that these people are taking care of these people. They can't take care of themselves. And he lied on that. If I don't put them up, then how do I get his lie in?" (App. p. 541, lines 4-13). When asked if she could have introduced the documents through Walker on cross examination, she testified, "I guess I could've."

During the trial Walker admitted that he did not correctly fill out the accountability log and was written up for not doing it correctly. (App. p. 78, lines 11-25). During cross examination Walker admitted to falsifying the accountability log and admitted that disciplinary action was taken against him as a result. (App. p. 94, lines 4-5; p. 95, lines 18-22). Ralph Courtney, the executive director of the Tri-Development Center also testified as a State's witness and discussed the accountability logs and the disciplinary action taken against Walker in regard to the log. (App. pp. 109-111). Trial counsel could have entered Defense Exhibits #5 and #6, the Tri-Development disciplinary notice and the Tri-Development maintenance log through either of these witnesses.

In the order of dismissal the PCR judge wrote, "This Court finds Applicant failed to meet his burden proving counsel was ineffective for failing to interview defense witnesses." Trial counsel testified at the PCR hearing that she interviewed the witnesses prior to trial. (App. p. 542, line 17 – p. 543, lines 1-6). Trial counsel testified, however, that she was not aware that these witnesses would testify that Walker was a good employee. (App. p. 543, lines 7-10). There is no probative evidence in the record to support the finding of the PCR judge. Trial counsel was ineffective in calling Tyler and Sharp as witnesses when Courtney and Walker had already testified about Walker falsifying the documents. Counsel was additionally ineffective in failing to ascertain

that the testimony of Tyler and Sharp would hurt the defense case by providing credibility to the alleged victim as a good employee. Petitioner was prejudiced by the deficient performance because the credibility of the witnesses was a critical factor to be determined by the jury.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in calling Tyler and Sharp as witnesses and failing to ascertain that their testimony would be more damaging than helpful to the defense case. There is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. In Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), the South Carolina Supreme Court found that trial counsel was deficient in presenting a defense witness without first interviewing the witness to ascertain whether she would support petitioner's theory

of the defense. While trial counsel testified that she interviewed the witnesses, she failed to ascertain that they would testify that Walker was a good employee, lending credibility to Walker's testimony. It was objectively unreasonable for counsel to call these witnesses given the limited value of their cumulative testimony regarding Walker falsifying documents and the damaging testimony about Walker being a wonderful employee. As in Ingle, this court should find that counsel was ineffective and that Petitioner was prejudiced by the deficient performance.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to preserve for appellate review the admission of Petitioner's prior conviction for criminal sexual conduct.

Prior to the defense presenting witnesses, trial counsel objected to the State's use of a prior conviction for criminal sexual conduct from June 26, 2006, for impeachment purposes because the prejudicial effect of the conviction outweighed any probative value. (App. p. 196, lines 10-18). The trial judge did not rule on the objection at that time. Instead, the trial judge advised Petitioner, "If I allow the state to impeach you by the introduction of that record I will tell the jury they can only use it for impeachment purposes and it couldn't be used to determine guilt or innocence in this trial." (App. p. 198, lines 14-17).

The first witness called by the defense was Deputy Michael Scott Williams of the Aiken County Sheriff's Department. Petitioner testified next and trial counsel asked about the prior conviction. (App. p. 241, lines 2-4). The State also questioned Petitioner about the prior conviction. (App. p. 257, lines 17-21). After the jury found Petitioner guilty and the judge sentenced him to life without parole trial counsel stated, "Your Honor, I have one last matter I need to put on the record. I forgot about it yesterday and I do apologize, but we had a sidebar conversation after my motion to require the state – to ask the state not be allowed to bring up Mr.

Holston's record that we did have a side bar conversation where I asked you for clarification on your ruling and you did advise the solicitor and myself that you were allowing them to bring in that – to bring in that charge.” (App. p. 340, lines 12-21). The judge responded, “And I did and I found – I made an analysis under 403. I found it to be more probative than prejudicial. I found it to be a proper matter for the jury to have for them to determine the credibility of the witnesses and they were charged that it could only be used for credibility purposes.”

On direct appeal Petitioner raised the issue of “Whether the trial court erred in allowing appellant to be impeached with a prior conviction of first degree criminal sexual conduct when the conviction was not a crime of dishonesty and the trial court failed to put a Rule 403, SCRE, analysis on the record?” The South Carolina Court of Appeals affirmed writing, “Affirmed pursuant to Rule 220(b), SCACR, and the following authority: State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (“[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.”).” State v. Holston, No. 2012-UP-678 (S.C.Ct.App. December 28, 2012).

In the PCR application Petitioner alleges, “Trial counsel was deficient in allowing the trial courts to admit applicant's prior criminal sexual conduct conviction to impeach applicant without moving the courts to conduct a balancing analysis and articulate on the record specific facts and circumstances to overcome Rule 609's admissibility.” (App. p. 366). During the PCR hearing Petitioner alleged that trial counsel was ineffective in failing to make a contemporaneous objection to preserve the admission of the prior conviction for appellate review. (App. p. 512, line 1 – p. 513, lines 1-22).

In the order of dismissal the PCR judge wrote:

Trial counsel stated she objected to the use of conviction and argued it would be more prejudicial than probative. However, Trial Counsel stated the charge was within the ten year time period necessary for impeachment purposes. Trial counsel further stated the court had a side bar where he explained that he was going to allow the Applicant to be impeached with the prior conviction, but to remind him to place on the record his 403 analysis. Trial counsel stated the court does not like to send to [sic] the jury out unnecessarily and requested counsels to remind the court to place his findings on the record. Trial Counsel stated she forgot to remind the court to place his findings on the record until the end of trial. Trial counsel stated she brought up the criminal sexual conduct conviction on direct to “take the wind out of the prosecutor’s sails.” This court finds Trial Counsel’s representation of Applicant well within the bounds of “professional norms.” Cherry, 300S.C. at 117, 385 S.E.2d at 625 (citing Strickland). This Court finds Trial Counsel properly objected to the State impeaching Applicant with his prior 2006 criminal sexual conduct conviction.

(App. pp. 572-573). The PCR judge erred. The finding by the PCR judge is in direct contradiction to the finding by the Court of Appeals on direct appeal that the admission of the prior conviction was not preserved for appellate review without a contemporaneous objection. Trial counsel was ineffective in failing to preserve for appellate review the admission of the prior conviction. Petitioner was prejudiced by the deficient performance.

Rule 609(a)(1) SCRE provides that evidence that an accused has been convicted of a crime punishable by death or imprisonment in excess of one year shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

In State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000) the South Carolina Court of Appeals wrote:

Rule 609(a)(1) differs from Rule 609(b) in two important respects. First, Rule 609(a) does not include a requirement that the probative value *substantially* outweigh the prejudicial effect to the accused. Second, Rule 609(a) does not state that the decision to admit the prior conviction must be supported by specific facts and circumstances. Notwithstanding the differences between Rule 609(a) and (b), at least two courts require the trial judge to make an on-the-record finding that the probative value of admitting a prior conviction under Rule 609(a)(1) outweighs the prejudicial effect to the accused before admission. See United States v. Preston, 608 F.2d 626, 629 (5th Cir.1979) (“We hold today that a Trial Judge

must make an on-the-record finding that the probative value of admitting a prior conviction outweighs its prejudicial effect before admitting a non-609(a)(2) prior conviction for impeachment purposes under Rule 609(a)(1). An on-the-record finding that probative value outweighs the prejudicial effect is not merely an idle gesture. Such a finding assures that the Judge has at least taken into account the relevant considerations.”); see also Peterson a/k/a Nene v. Mississippi, 518 So.2d 632 (Miss.1987).

Other courts do not require a specific on-the-record finding, as long as the record reveals that the trial judge did engage in a meaningful balancing of the probative value and the prejudicial effect before admitting a non-609(a)(2) prior conviction under 609(a)(1). See United States v. Walker, 817 F.2d 461 (8th Cir.1987); Radtke v. Cessna Aircraft Company, 707 F.2d 999 (8th Cir.1983); Cunningham, 638 F.2d 696 (4th Cir.1981); United States v. Rosales, 680 F.2d 1304 (10th Cir.1981); United States v. Thompson, 612 F.2d 233 (6th Cir.1979); United States v. Mahone, 537 F.2d 922 (7th Cir.1976); United States v. Frazier, 14 M.J. 773 (1982); State v. Cross, 123 Ariz. 494, 600 P.2d 1126 (Ct.App.1979); State v. Anderson, 336 N.W.2d 123 (N.D.1983); Theus v. State, 845 S.W.2d 874 (Tex.Crim.App.1992); cf. State v. Spearin, 428 A.2d 381 (Me.1981). We believe this to be the better rule.

However, as our supreme court observed in a 609(b) analysis, it is difficult for an appellate court to determine that the safeguards provided to the accused have been properly invoked when the trial judge does not explicitly rule that the probative value outweighs the prejudicial impact to the accused, and provide the reasons for this ruling. See Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Consequently, we join with other jurisdictions in urging the trial bench to articulate its ruling and the basis for it, thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1).

Petitioner was prejudiced by trial counsel’s failure to preserve the issue for appellate review because, if the issue had been preserved, the State, as the proponent of the impeachment evidence, failed to meet its burden in establishing the basis for admission. See State v. Scriven, 339 S.C. 333, 340, 529 S.E.2d 71, 74-75 (Ct. App. 2000) (“The party attempting to introduce the prior conviction for impeachment purposes has the initial burden of establishing the basis for its admission. See United States v. Cunningham, 638 F.2d 696 (4th Cir.1981). Furthermore, the rule requires the trial judge to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused. See State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000)

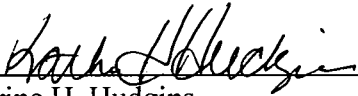
(expressly approving the five-factor analysis generally employed in federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused, but noting that there may be other factors which a trial judge should, in the exercise of discretion, consider under the facts and circumstances of each particular case); see also United States v. Sanders, 964 F.2d 295 (4th Cir.1992)").

Trial counsel was ineffective in failing to preserve the admission of Petitioner's prior conviction for appellate review. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different and Petitioner would have prevailed on appellate review.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to further briefing on the issues.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Knox McMahon, Circuit Court Judge

DARRIN HOLSTON,

PETITIONER,

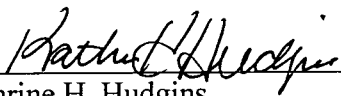
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STATE OF SOUTH CAROLINA,

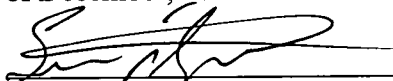
RESPONDENT

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 Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Darrin Holston, #288828, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of December, 2015.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

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


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.