STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2015-UP-501 (S.C. Ct. App. Filed October 28, 2015)

2008-GS-18-0009

THE STATE,

RESPONDENT,

V.

DON-SURVI CHISOLM,

PETITIONER

APPELLATE CASE NO. 2016-000092

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 17, 2015. App. 43.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding the trial court properly admitted evidence of Petitioner's alleged prior drug dealing when the evidence was not admissible to prove motive pursuant to Rule 404(b), SCRE, was not necessary to a full presentation of the case, and where its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE?

2.

Did the Court of Appeals err by holding Petitioner's challenge to the admission of a firearm into evidence on grounds that there was an insufficient nexus to prove the weapon was involved in the murder thereby making it irrelevant and highly prejudicial was not preserved for appellate review and by failing to address the merits of the claim?

3.

Did the Court of Appeals err by holding the trial court properly denied Petitioner's motion to suppress evidence derived from a search warrant issued on September 27, 2007 for Petitioner's 2007 Dodge Durango when the search warrant was based on defective information?

4.

Did the Court of Appeals err by holding the trial court properly refused to allow Petitioner to cross-examine Detective Zensen about DNA testing performed on a seized firearm, specifically as it pertained to the decedent, since Petitioner had the right to show that the detective's answers were inconsistent in this regard and because the evidence was relevant to the thoroughness and accuracy of the investigation?

5.

Did the Court of Appeals err by holding the trial court properly allowed Petitioner to represent himself where the trial judge did not inquire about the nature of the conflicts Petitioner was having with his attorney, did not warn Petitioner that a murder conviction would constitute an aggravating circumstance for the state to seek the death penalty in his other Berkeley County murder case, and was very vague and not specific about the dangers and disadvantages of self-representation?

STATEMENT OF THE CASE

A Dorchester County Grand Jury indicted Petitioner at the January 14, 2008 term of General Sessions for the offense of murder. R. 690-691. His case was called to trial on September 13, 2011 before the Honorable Diane S. Goodstein, and a jury. Assistant Solicitors Russell Hilton and Matt Austin represented the state, and Petitioner represented himself. R. 132. John Loy was stand-by counsel. R. 132.

On September 19, 2011, the jury found Petitioner guilty. R. 686, ll. 10-14. He was sentenced by Judge Goodstein to life without parole. R. 689, ll. 4-6.

The Court of Appeals affirmed Petitioner's conviction on October 28, 2015. State v. Chisolm, 2015-UP-501 (S.C. Ct. App. Filed October 28, 2015); App. 1-3. Petitioner filed a Petition for Rehearing on November 12, 2015. App. 4-26. By letter dated November 13, 2015, the Court of Appeals requested the state file a Return. App. 27. On November 23, 2015, the state filed a Return to Petition for Rehearing. App. 28-42. By order dated December 17, 2015, the Court of Appeals denied the Petition for Rehearing. App. 43.

Petitioner now files this Petition for Writ of Certiorari requesting this Court review the Court of Appeals' decision.

ARGUMENT

1.

The Court of Appeals erred by holding the trial court properly admitted evidence of Petitioner's alleged prior drug dealing when the evidence was not admissible to prove motive pursuant to Rule 404(b), SCRE, was not necessary to a full presentation of the case, and where its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

Relevant Facts

Shaquanda White testified that she rode as a front passenger in Petitioner's Dodge Durango approximately one week before September 13, 2007, the date of the murder. R. 253, ll. 14-22. She claimed the front passenger seat was in "normal condition," did not have any major holes, and did not need to be replaced. Moreover, Shaquanda said she remembered seeing the front passenger seatbelt and that it was "fine." R. 253, l. 23 – 254, 1. 17. David White, the only alleged witness to the shooting, claimed that after the murder, the front passenger seat of Petitioner's Dodge Durango had "a big spot of blood on it" and Petitioner told him several hours later that he was trying to find a new front passenger seat for the vehicle. Petitioner allegedly showed White where he had cut a large hole in the seat to remove the blood and put a black and gray cover on the seat to hide the hole. White also noticed the front seatbelt was missing and claimed it had been cut out. R. 294, l. 6 – 298, l. 11.

Based on this testimony, the state sought to present evidence that Petitioner had replaced the front passenger seat of his Durango within days of the murder to destroy evidence linking him to the offense. Specifically, the state sought to present the testimony of Thomas Simonelli regarding an alleged agreement between Simonelli and Petitioner in which Simonelli would purchase a passenger seat from LKQ Auto Parts on a credit card in exchange for cocaine. The state also planned to have Simonelli testify that he knew Petitioner because Petitioner was Simonelli's "cocaine supplier." R. 382, ll. 2-24. The state argued Simonelli's testimony was admissible under Rule 404(b), SCRE to

show motive. The solicitor emphasized Tamekka Williams' testimony that the decedent had started selling drugs about a month prior to the murder and argued, "I need to establish at this point . . . [Petitioner] also sold drugs in that area to show motive as to why he would want to take out the victim." R. 384, l. 23 – 385, l. 10; See R. 241, l. 20 – 242, l. 8. The solicitor stated, "It's the state's position that that would be quite a good reason for Mr. Chisolm [Petitioner] to want to take out a fellow drug dealer that's cutting into his territory." Id. The state also argued the testimony was more probative than prejudicial because Petitioner told law enforcement he replaced the seat because it had cigarette burns on it. The solicitor asserted it was unusual that a person who wanted to replace a car seat would do so when he could not afford to do it with cash and was forced to make a third-party purchase involving cocaine the day after a murder. R. 384, ll. 3-22; R. 386, l. 10 – 387, l. 13.

Petitioner objected to Simonelli's testimony and argued it was not admissible under Rule 404(b), SCRE to establish motive. He stated, "That is pure speculation and is highly prejudicial. It's remote in time, it's not *res gestae*. It's not subject of conviction, it's purely unrelated and unsubstantiated conjecture." R. 385, ll. 11-14. Petitioner emphasized that Tamekka Williams, who previously testified the decedent sold drugs, never mentioned Petitioner and the decedent had a conflict, nor was there any previous testimony indicating Petitioner sold drugs. Instead, the only evidence the state had was testimony from Simonelli that a trade was going to take place, but never did because the credit card was declined. R. 385, ll. 15-23; See R. 241, l. 20 – 242, l. 8. Moreover, Petitioner stated, "I just think it's highly prejudicial towards me. I've never been arrested for any drug charges. There's no evidence of ill will between me and Red [the decedent]. Other than this accusation there's nothing historically to show any problems between us. No one has testified that there was a war between us in drug competition. Nothing of that nature, Your Honor. It's just pure speculation . . ." R. 388, ll. 17-24.

The trial court ruled Simonelli's testimony was admissible. The judge found the testimony was relevant to show Petitioner replaced the seat in his Durango shortly after the murder and to show motive under Rule 404(b), SCRE. Additionally, the court ruled "the probative value far exceeds the prejudicial effect" to Petitioner because the testimony regarding cocaine and Petitioner's alleged prior drug dealing was not similar to the offense for which he was on trial. Specifically, the court emphasized that the alleged prior bad act did not involve physical violence, which would be too similar to the allegations in this case. R. 388, l. 25 – 390, l. 20.

Simonelli ultimately testified that he "used to have a drug problem" and that Petitioner sold him drugs. R. 411, ll. 21-24. Petitioner contemporaneously renewed his objection, which the court overruled. R. 412, ll. 1-4. Simonelli also claimed that on September 14, 2007, Petitioner called him in reference to purchasing a car seat. According to Simonelli, Petitioner asked Simonelli if he would buy a seat from LKQ Auto Parts on a credit card in exchange for cocaine. However, the credit card was declined and the purchase never took place. R. 412, l. 6 – 414, l. 4.

The state discussed its theory of Petitioner's motive during its closing argument. The solicitor suggested Petitioner killed the decedent because the decedent started selling drugs in the area about a month before his death, and his actions were interfering with Petitioner's own drug dealing business. R. 663, l. 11 – 664, l. 1.

Discussion

The Court of Appeals erred by holding the trial court properly admitted evidence of Petitioner's alleged prior drug dealing and the alleged trade since it was remote in time, irrelevant to the murder, failed to establish any logical motive based on the evidence presented, and its probative value was substantially outweighed by unfair prejudice to Petitioner.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity. It may, however, be admissible to show motive,

identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE Rule 404(b); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, alleged prior bad acts that are not the subject of conviction must be proved by clear and convincing evidence. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); State v. Smith, 300 S.C. 216, 218-219, 387 S.E.2d 245, 247 (1989). Additionally, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000). "Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." SCRE Rule 403; See State v. Garner, 304 S.C. 220, 221-222, 403 S.E.2d 631, 632 (1991).

Simonelli's testimony that Petitioner previously sold him drugs lacked any logical relevance to the murder for which Petitioner was accused. See Brooks, 341 S.C. at 61, 533 S.E.2d at 327. *The connection was simply not there*. Besides Simonelli's testimony that Petitioner sold him drugs, the only other evidence produced at trial that contributed to the state's farfetched theory of motive was the testimony of Tamekka Williams that the decedent began selling drugs about a month before his death. R. 241, l. 20 – 242, l. 8; R. 411, l. 21 – 414, l. 4. As Petitioner argued at trial, "It's purely unrelated and unsubstantiated conjecture." R. 385, ll. 11-14. There was *no* evidence of a conflict between Petitioner and the decedent over alleged drug dealing nor was there *any evidence* of a competition between the two. David White, the only alleged witness to the murder, claimed there was *no arguing* between Petitioner and the decedent and that he did not know why Petitioner allegedly shot the decedent. R. 300, ll. 3-5. There was *nothing* in the record to support the inference that the decedent and Petitioner were involved in competing drug dealing businesses. Therefore, Simonelli's testimony should not have been admitted under Rule 404(b) to support the state's farfetched theory of motive.

Additionally, the evidence that Petitioner allegedly offered to trade cocaine in exchange for the purchase of the front passenger seat was *not* "necessary to a full presentation of the case" as the Court of Appeals held. The state was able to present evidence that Petitioner had called numerous junk yards looking for a front passenger seat to a 2006 Dodge Durango and that Petitioner ultimately obtained a new front passenger seat for his vehicle from LKQ Auto Parts within a few days of the murder. The specific testimony regarding Petitioner's alleged offer to trade cocaine in exchange for Simonelli putting the seat on a credit card was completely unnecessary and was simply used by the state to damage Petitioner's character and credibility.

Not only was there no logical relevance between Petitioner's alleged prior drug dealing and the murder for which Petitioner was tried, but any probative value of the testimony regarding Petitioner's alleged prior drug dealing and the alleged agreement was substantially outweighed by the danger of unfair prejudice. Petitioner was prejudiced because such testimony was destructive to his character and hence his credibility. While Petitioner did not testify at trial, he made various statements to law enforcement that were presented to the jury, such as he purchased a new front passenger seat for his Durango because of burn holes from cigarettes. See R. 428, l. 19 – 429, l. 4. Thus, Petitioner's credibility was an important factor in the case.

Moreover, it appears the Court of Appeals may have overlooked or simply ignored this Court's opinions in State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990), State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990), and State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992).

In Coleman, this Court held prejudice to Coleman from the admission of evidence that he was a social user of cocaine outweighed any probative value to show Coleman's motive or state of mind at the time of the murder. Despite evidence Coleman was "wired" on the morning of the murder, this Court concluded there was no evidence Coleman's condition was the result of cocaine use nor was there any evidence in the record to support the inference that the victim and Coleman

were involved in a drug transaction. Instead, this Court held the only function of this evidence was to demonstrate Coleman's bad character and thus it granted him a new trial. 301 S.C. at 60, 389 S.E.2d at 660.

In Bolden, this Court held evidence of Bolden's alleged crack cocaine use in a hotel shortly before the hotel was robbed was prejudicial error when its only function was to demonstrate the defendant's bad character. This Court stated, "[T]here is nothing in the record to indicate a logical relevance between use of crack cocaine during the night before the robbery and the robbery which occurred at 6:10 am the following day." 303 S.C. at 43, 398 S.E.2d at 494-495. This Court further held that even if the testimony was relevant, its probative value was clearly outweighed by its unfair prejudice and thus remanded Bolden's case for a new trial. 303 S.C. at 43-44, 398 S.E.2d at 495.

In Smith, this Court held evidence of Smith's prior drug use, unrelated to the murder and armed robbery, should have been excluded. Despite considerable evidence of cocaine use during the actual murder and armed robbery, the Court held Smith's *prior* cocaine use was highly prejudicial and "so destructive to [Smith's] character, hence her credibility, that it cannot be held harmless error or cumulative." This Court reversed Smith's convictions and death sentence and remanded the case for a new trial. 309 S.C. at 446-447, 424 S.E.2d at 498-499.

The facts of Petitioner's case are similar to the facts of the above cited cases. Evidence of Petitioner's alleged *prior* drug dealing and the alleged agreement involving cocaine was highly prejudicial, failed to establish any logical motive based on the evidence presented, and was extremely destructive to his character and credibility. Moreover, it was not necessary for "a full presentation of the case." Respectfully, this Court should hold the Court of Appeals erred by affirming the trial court's erroneous ruling and reverse Petitioner's conviction.

2.

The Court of Appeals erred by holding Petitioner's challenge to the admission of a firearm into evidence on grounds that there was an insufficient nexus to prove the weapon was involved in the murder thereby making it irrelevant and highly prejudicial was not preserved for appellate review and by failing to address the merits of the claim.

Relevant Facts

David White claimed he saw the gun Petitioner allegedly used to shoot the decedent. White testified, "It was a twenty-two, a twenty-two long. I know what a twenty-two long look like [sic]. It was a twenty-two long, long on the muzzle." R. 283, ll. 23-25. White provided no further details regarding the appearance or characteristics of the weapon. When presented with a gun identified as State's Exhibit No. 14, White stated, "That *looks like* the gun [Petitioner] shot [the decedent] with." R. 284, ll. 17-18 (emphasis added). White further claimed that before Petitioner drove him home on the morning of the murder, Petitioner stopped at Bacon Bridge Road and "tossed the gun out over the bridge." R. 289, ll. 18-23; R. 293, ll. 1-9.

Allison Greer of the Dorchester County Sheriff's Office testified that the sheriff's office learned of the location of the alleged murder weapon when David White came forward. R. 429, ll. 16-21. Greer was a member of the "dive team" and was "requested to dive the area off of Bacon's Bridge Road where the Ashley River crosses over Bacon's Bridge." R. 429, l. 22 – 430, l. 7. The dive team ultimately located and recovered a twenty-two caliber Browning Buck Mark semi-automatic pistol a few days into the search. R. 430, l. 25 – 431, l. 4. When presented with a firearm identified as State's Exhibit No. 14, Greer testified, "That it *appears to be* the same weapon that we located." R. 433, ll. 14-18 (emphasis added).

When the state subsequently offered State's Exhibit No. 14 into evidence, Petitioner clearly objected on grounds of relevance, lack of foundation, and improper chain of custody. R. 433, l. 22 –

434, l. 4; R. 436, ll. 1-6. Based on the solicitor's argument in response, it is apparent the state understood the grounds of Petitioner's objection. The solicitor argued the gun was tied to the murder through White and that it was found in the water at the location where White said it would be, clearly attempting to suggest the weapon was relevant and that there was a sufficient nexus. The solicitor concluded the gun was "*certainly relevant*" and that the state laid a proper foundation for the gun to be admitted into evidence. R. 434, l. 15 – 435, l. 8 (emphasis added).

Petitioner further argued that David White was "high on cocaine, freaked out, he was in a dark car," thus implying White was not reliable in his identification of the alleged murder weapon and that the gun was not relevant to the case. R. 436, ll. 8-10.

The trial court sustained the objection finding additional foundation was required. R. 436, l. 13 – 43. Greer then testified that she was present when the firearm was recovered from the river. She claimed the gun removed from the water and firearm identified as State's Exhibit No. 14 both had gold triggers and the handle grips appeared to be the same shape. R. 437, l. 23 – 439, l. 1.

The weapon was ultimately admitted into evidence during Detective Zensen's testimony. Zensen said she took possession of the weapon immediately after it was recovered from the water and transported the gun directly to SLED. R. 473, l. 10 – 474, l. 25. She identified State's Exhibit No. 14 as the gun recovered from the river. She further claimed the weapon had a "very distinctive" green neon sight and a "very distinctive" gold trigger. R. 472, l. 25 – 473, l. 9; R. 474, ll. 23-25.

When the state sought to admit the weapon, Petitioner properly renewed his objection stating, "I'll just renew my objection, Your Honor, *on the same grounds*." R. 475, ll. 18-23 (emphasis added). The trial court simply ruled, "Very well. Overruled." App. 475, l. 23. The court presumably overruled the objection based on all grounds raised by Petitioner, including lack of relevance, lack of foundation, and an insufficient chain of custody. Consequently, this issue was properly preserved for appellate

review and the Court of Appeals must have overlooked the parts of the record that show Petitioner objected based on relevance and that the weapon was not properly connected to this murder.

After the firearm was admitted over objection, Ira Parnell, who was qualified as an expert in firearms and ballistics, testified that he examined State's Exhibit No. 14, the alleged murder weapon, and State's Exhibit No. 18, the bullet recovered from the decedent's body. R. 611, ll. 9-17. Parnell said the bullet was "badly damaged" and thus he was unable to determine whether the bullet was or was not fired from the firearm marked as State's Exhibit No. 14. R. 612, l. 21 – 613, l. 9.

Discussion

The trial court erred by admitting State's Exhibit No. 14 into evidence because there was insufficient evidence connecting this weapon to the murder of Craig Michael Canady or to Petitioner making the evidence not relevant. Further, admitting this weapon without establishing its relevance was extremely prejudicial to Petitioner.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Additionally, even relevant evidence should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Elders, 386 S.C. 474, 486, 688, S.E.2d 857, 863 (Ct. App. 2010) (quoting State v. Gilchrist, 329 S.C. 621. 630, 496 S.E.2d 424, 429 (Ct. App. 1998)).

David White, the *only* alleged witness to the murder, testified that the gun Petitioner allegedly used to shoot the decedent was a "twenty-two long." R. 283, ll. 23-25. White provided no further details. White did not testify about the "very distinctive" neon green sight nor did he mention the "very

distinctive" gold trigger. R. 473, ll. 7-9. As Petitioner argued at trial, White was high on cocaine and "freaked out" on the night of the alleged murder. R. 436, ll. 8-10. White testified he did not see any guns before the alleged shooting and that after the alleged shooting he "was in shock" and his "mind went blank." R. 280, ll. 14-17; R. 282, l. 11 – 283, l. 20. Additionally, the incident allegedly took place in the early morning hours when it was dark outside. R. 281, ll. 14-20. The lack of description of the alleged murder weapon provided by White coupled with the circumstances surrounding the incident, including the fact that it was dark outside and that White was high on cocaine and "freaked out," indicate that it was highly unlikely White could reliably identify the weapon.

The only other information White provided to law enforcement was that Petitioner allegedly stopped on Bacon Bridge Road on the night of the murder and "tossed the gun out over the bridge." R. 289, ll. 18-23; R. 293, ll. 1-9. Even if White's testimony that Petitioner threw the gun over Bacon Bridge is to be believed, there is no reliable evidence that the weapon recovered by law enforcement and presented at trial as the alleged murder weapon was the actual weapon used to inflict the injury upon the decedent. Significantly, Parnell, the firearms and tool mark expert, was unable to determine whether the bullet recovered from the decedent's body was or was not fired from this weapon because the bullet was so badly damaged. R. 612, l. 21 – 613, l. 9.

Additionally, there was no testimony that Petitioner owned a similar gun or had been seen with a gun prior to the alleged murder. Tamekka Williams testified that she told detectives she had never seen Petitioner with a gun. R. 237, ll. 18-20. Shaquanda White also testified that she told detectives she had never seen Petitioner with a weapon. R. 265, ll. 9-11. There was no evidence that Petitioner owned the gun recovered by law enforcement in the Ashley River or that he had ever previously had the gun in his possession. In short, there is nothing tying Petitioner to that weapon or the gun to this murder besides David White's testimony that it "looks like" the gun Petitioner used to allegedly kill the decedent. R. 284, ll. 17-18.

Because there was no reliable evidence connecting the twenty-two caliber Browning Buck Mark semi-automatic pistol to the murder of Craig Michael Canady or to Petitioner, the trial court should have ruled the gun was inadmissible based on a lack of relevance. Weapons with no connection to the crime are not admissible. See State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010). Moreover, because there was an insufficient nexus connecting the weapon to the murder, its admission was unduly prejudicial to Petitioner as it led the jury to believe that White's testimony was credible because law enforcement discovered the alleged murder weapon where White said it would be located. Since White was allegedly the sole witness to the murder, his credibility was crucial to the state's case.

Respectfully, this Court should hold the Court of Appeals erred by finding this issue was not preserved for appellate review and ultimately hold the trial court erred by admitting State's Exhibit No. 14 into evidence.

3.

The Court of Appeals erred by holding the trial court properly denied Petitioner's motion to suppress evidence derived from a search warrant issued on September 27, 2007 for Petitioner's 2007 Dodge Durango when the search warrant was based on defective information.

Relevant Facts

Petitioner moved pretrial to suppress all evidence seized as a result of a search warrant issued on September 27, 2007 for his 2007 Dodge Durango on grounds that the warrant was issued in violation of S.C. Code § 17-13-140 and the Fourth Amendment. R. 133, ll. 11-16. Officers executed a valid search warrant on Petitioner's Durango on September 17, 2007 and found no items of evidentiary value. Officers subsequently obtained a second search warrant for the vehicle on September 27, 2007 citing the same grounds for probable cause that led to the first search warrant along with adding new information to the affidavit that was false. R. 133, l. 17 – 134, l. 21. Petitioner argued the new information in the affidavit that was false was the sentence, "Officers obtained several verbal and

written statements that Donsurvi Chisolm [Petitioner] purchased a passenger side front seat for a Dodge Durango on September 14, 2007." R. 138, l. 3 – 139, l. 19. Petitioner stated, "[I]t was never confirmed that a purchase took place on September 14, 2007." R. 139, ll. 4-5. Moreover, he argued the affiant, Detective Mike Giglio, "willfully and knowingly with reckless disregard for the truth submitted false information on an affidavit for a warrant, and the warrant should therefore be deemed invalid, and its fruits excluded from use in court under the exclusionary rule under the U.S. Constitution." R. 137, ll. 4-9.

Detective Giglio testified that, through verbal and written statements from various employees at LKQ Auto Parts and a parts invoice, the sheriff's office learned a customer identified as Petitioner attempted to purchase a gray "right front seat" pulled from a 2006 Dodge Durango on September 14, 2007. R. 143, l. 19 – 144, l. 1; R. 145, l. 7 – 146, l. 4. One of the written statements obtained stated, "His dad called in with credit card to pay for seat. Credit card declined. So customer came back the next day and paid cash." R. 151, ll. 6-10. Detective Giglio testified that the business, however, could not produce a final sales receipt and thus it was unclear whether the front passenger seat was purchased by Petitioner legally with cash on September 15, 2007 or whether it was stolen on that day. R. 152, l. 16 – 155, l. 24; R. 164, ll. 1-17; R. 166, l. 17 – 167, l. 11. Regardless, it was undisputed that a seat was not purchased on September 14, 2007. R. 151, ll. 6-16.

Detective Giglio claimed he relied on this information when he obtained the second search warrant for Petitioner's Dodge Durango. R. 164, l. 22 – 165, l. 12. He further maintained that the statement in the affidavit in support of the second search warrant that stated the seat was purchased on September 14, 2007 was a "clerical error" and it should have stated September 15, 2007. R. 165, l. 17 – 166, l. 4. Giglio claimed he did not know he made a mistake regarding the date until Petitioner pointed it out to him. R. 166, ll. 5-10.

After Detective Giglio testified, Petitioner cited State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), and argued the officer "provided false information to a magistrate with absolutely no intention of showing good faith effort to correct it. This information was sworn to and taken by the magistrate as true. I'm sure if [the magistrate] knew it was a lie the warrant would never have been issued, and since we know as much now, I ask for this warrant to be suppressed." R. 168, l. 1 – 169, l. 7.

The trial court found the affidavit was not given in bad faith or recklessly and that it was supported by probable cause. It therefore denied Petitioner's motion to suppress. R. 169, l. 14 – 170, l. 15. This was error.

Discussion

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. Additionally, under S.C. Code Ann. §17-13-140, a warrant should be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."

"The Fourth Amendment itself provides no remedy for a violation of the warrant requirement." State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) (internal citations omitted). "However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." Id. Under South Carolina case law, the proper test for dealing with inaccuracies in an affidavit in support of a search warrant is as follows: "Did the officer . . . intentionally, recklessly, or in bad faith recite facts he knew or should have known to be erroneous, without correcting the error by additional affidavit or affirmation, to obtain the issuance of a warrant?" Sachs, 264 S.C. at 556, 216 S.E.2d at 509.

Additionally, in State v. Missouri, 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999), this Court invalidated a search warrant where it found "the combination of the police officer's deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant."

Petitioner established during the suppression hearing that Detective Giglio's statement in the affidavit in support of the second search warrant that "Donsurvi Chisolm [Petitioner] purchased a passenger side front seat for a Dodge Durango on September 14, 2007" was false. The evidence produced at the hearing indicated the sheriff's office learned from employees at LKQ Auto Parts that a passenger seat was pulled from a 2006 Dodge Durango for a customer identified as Petitioner on September 14, 2007. However, there was no evidence that the seat was actually purchased on that date. Instead, there was very *questionable* evidence regarding whether the seat was purchased by Petitioner on the following day, September 15, 2007. The sheriff's office had no evidence to confirm Petitioner or anyone else actually purchased a front passenger seat on September 15, 2007. It is likely Giglio either intentionally or recklessly made the statement that Petitioner purchased a new front passenger seat on September 14, 2007 when he knew or should have known through investigation that the information was false. Without the false statement, there was no additional evidence to support a second search warrant. Therefore, the evidence seized as a result of the warrant should have been suppressed under the exclusionary rule. See Wong Sun v. United States, 371 U.S. 471 (1963).

Respectfully, this Court should hold the Court of Appeals erred by finding the trial court properly denied Petitioner's motion to suppress, reverse Petitioner's conviction, and remand for a new trial.

4.

The Court of Appeals erred by holding the trial court properly refused to allow Petitioner to cross-examine Detective Zensen about DNA testing performed on a seized firearm, specifically as it pertained to the decedent, since Petitioner had the right to show that the detective's answers were inconsistent in this regard and because the evidence was relevant to the thoroughness and accuracy of the investigation.

Relevant Facts

Detective Zensen testified extensively regarding her involvement in the investigation of the death of Craig Michael Canady. She processed the scene where the body was discovered on Clubhouse Road. R. 450, l. 17 – 451, l. 11. She also assisted in the execution of a search warrant on Petitioner's Dodge Durango and transported the alleged murder weapon to SLED after it was recovered from the water. R. 458, ll. 4-17; R. 472, l. 25 – 474, l. 25.

Throughout her testimony, Zensen testified about various items that were sent to SLED for testing, specifically for comparison against the DNA of the decedent, including swabs, hair, and fingernail clippings, among other items. On cross-examination, Petitioner asked Zensen whether she recalled anything else being sent to SLED for testing. Zensen responded, "No." R. 515, l. 12 – 516, l. 2. Petitioner then attempted to impeach Zensen with evidence that on January 7, 2008 a request was sent to SLED to compare a twenty-five caliber automatic handgun against the decedent's DNA profile.

The state objected on grounds of relevance. R. 516, l. 1 – 517, l. 3. The solicitor argued the firearm Petitioner wished to question Zensen about was recovered from an unrelated individual at some other time and has "no connection to the crime whatsoever." R. 517, ll. 10-13. Petitioner argued he should be able to impeach Zensen with the SLED report "since the question was not answered correctly I would, at least, like to straighten out the mis-statement and the false representation." R.

518, ll. 13-21. Petitioner said the twenty-five caliber gun was recovered two months after his arrest and was listed under the same SLED number. R. 520, ll. 20-24; R. 522, ll. 3-6.

After further discussion, the court ruled, "This is absolutely not impeachment. If you want to ask her directly was there another gun at some later time that there was DNA testing done with regards to the alleged victim, we'll talk about that, but this is not impeachment." The court concluded that Petitioner could question Zensen about DNA testing performed on the twenty-five caliber handgun if he could prove relevance, but not as impeachment. R. 519, l. 16 - 525, l. 2.

Petitioner maintained the evidence was relevant because the weapon was recovered about two to three months after Petitioner was arrested from an individual acquainted with the decedent who lived in the very apartment complex where the murder allegedly occurred and was sent to SLED for comparison testing to the decedent's DNA. Petitioner reasoned the evidence was relevant because if the alleged murder weapon was already found then law enforcement would have no reason to investigate another firearm. R. 525, l. 3 – 526, l. 6. Petitioner argued:

> MR. CHISOLM: Siquan Moody. The person that Tamekka Williams got on the stand and said that Red [the decedent] was with the last time she saw him on Thursday, and after he left Siquan, Red came with me. I told detectives after Red left me he went back to Azalea Park. Azalea Park is where Siquan Moody stays at. The person that they recovered that gun from is Pierre Moody, that's Siquan Moody's younger brother. They're testing DNA from Craig Michael Canady [the decedent] against Pierre Moody's gun and they're all in the Haven Oaks - - I'm sorry - - they're all in the Azalea Park area, and this is after, like I said, Your Honor, we're already under arrest. But they're still investigating that Red went to Azalea Park and Siquan Moody and Pierre Moody, and they're testing his DNA exactly two to three months after David White said this happened, I did this, after David White gave them a weapon that has never been proven to be the murder weapon. If all that was true, why are they still investigating Siquan Moody's little brother against Craig Michael Canady's DNA on his gun. . ."

R. p. 525, l. 3 – 526, l. 2.

The court ruled the evidence was not relevant because according to the SLED report, the handgun recovered at the later time was a "semi-automatic pistol which could not fire the bullet that was removed from the body of this alleged victim." R. 527, l. 24 – 529, l. 4.

Discussion

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) and State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Petitioner should have been permitted at trial to impeach Detective Zensen with the SLED report that a second firearm was sent to SLED for comparison testing against the DNA of the decedent. By failing to allow Petitioner to impeach Zensen, her inaccurate statement remained uncorrected in the minds of the jurors. The jury was led to believe that all the potential evidence that was sent to SLED had been discussed at trial when the truth was that law enforcement was investigating a second firearm as being involved in the murder.

Additionally, the fact that law enforcement was examining another firearm in connection with the case was relevant to the thoroughness and accuracy of the investigation. The fact that law enforcement was investigating a second weapon indicated law enforcement was not firmly convinced that the gun recovered from the Ashley River was the murder weapon and that the officers considered that someone else may have been involved in the murder. This is relevant evidence that weakened the case against Petitioner and Petitioner should have been permitted to cross-examine the detective about this relevant evidence to defend himself.

5.

The Court of Appeals erred by holding the trial court properly allowed Petitioner to represent himself where the trial judge did not inquire about the nature of the conflicts Petitioner was having with his attorney, did not warn Petitioner that a murder conviction would constitute an aggravating circumstance for the state to seek the death penalty in his Berkeley County murder case, and was very vague, and not specific about the dangers and disadvantages of self-representation.

Relevant Facts

An *in camera* ex-parte hearing was held on Petitioner's request to represent himself. Petitioner was represented by John Loy at the time. R. 1; R. 4, ll. 1-7. It was apparent there were conflicts between Petitioner and Loy. Petitioner offered, "I don't want to waste the court's time arguing the conflicts and issues that me and Mr. Loy have together. I would like to proceed *pro se* as of this day February 11, 2011." R. 7, ll. 16-19.

The judge said she learned Petitioner was being housed in Berkeley County, and that he had to be transported to Dorchester County for this hearing. She maintained that she needed to know if Petitioner was using his motion for purposes of delaying the trials. Petitioner told the judge that his Berkeley County trial had not yet been scheduled. R. 9, ll. 14-24. Significantly, the subsequent Berkeley County case was also a murder trial. However, that important fact was never raised during the waiver hearing. Neither was the fact that if Petitioner was convicted of murder in Dorchester County that that conviction would constitute a "prior murder conviction" which would allow the state to seek -- or legitimately threaten to seek -- the death penalty in Berkeley County.[1] See S.C. Code Ann. § 16-3-20(C)(a)(2); R. 9, l. 10 – 10, l. 9.

[1] See State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (in context of statutory mitigating circumstance of absence of significant history of prior criminal conviction involving use of violence against another person, word "prior" would be construed to mean prior to trial, rather than prior to time of crime for which defendant was on trial). See also State v. Locklair, 341 S.C. 352, 370, 535 S.E.2d 420, 429 (2000) (same principle).

During the colloquy, Petitioner told the judge he was married with four children and that he had one year of college. Petitioner was never asked where he went to college and later told the judge he either graduated from high school or "got [his] GED" in response to a very open-ended question. R. 11, l. 19 – 13, l. 5. Petitioner had been in the service and he spent ten months in Afghanistan. Petitioner also told the judge he was in "Special Forces," and the judge interjected that she understood Petitioner could not talk about what occurred in Special Forces. R. 13, l. 7 – 15, l. 2. Petitioner had also worked with heavy machinery and most recently worked at a Sonic restaurant and then a McDonald's. However, his murder charge had hindered his ability to become employed. R. 12, l. 2 – 21, l. 10. Petitioner denied he had been treated for post-traumatic stress syndrome or had received any mental health treatment. R. 21, ll. 14-16.

The judge told Petitioner that his attorney, John Loy, was her friend, "and he is as fine a lawyer as there is for sure in this state, probably this country, you understand that?" Petitioner said he understood. R. 23, l. 16 – 24, l. 4.

The judge said one of her prepared questions dealt with possible defenses to the charge. She mentioned self-defense, but then said, "We're not going to talk about your defenses. We're just not going to do that. I'm not going to let you go into your factual basis. We're not going to do that. I'm not going to let you do that." Petitioner did not make any "audible response." R. 27, l. 22 – 28, l. 5. The judge only mentioned Petitioner's Berkeley County charges in passing stating they were "not helpful." R. 28, l. 25 – 29, l. 10. She said she did not need to know any more about the Berkeley charge although it was potentially "problematic." R. 29, ll. 11-21.

The judge very briefly told Petitioner he would have to "comply with the rules . . . rules of evidence, the court rules." R. 32, ll. 10-18. She said she thought Petitioner was proceeding with his eyes open, but then stated: "I don't think I understand the 'why' [you want to represent yourself] part of it. I think I don't like it. But that - - the judge's pleasure with it is - - doesn't get to be factored in. I

don't get a vote. You do. I don't." R. 35, ll. 10-13. Lastly, the judge told Petitioner that he was very bright and that he probably could have gone to law school. She told Petitioner that she believed he was capable and aware of what he was doing. R. 36, ll. 2-9.

Discussion

A defendant may waive his right to counsel and proceed *pro se*, but only if it is clear on the record that he understands the dangers and disadvantages of self-representation. See Faretta v. California, 422 U.S. 806 (1975). Here, Petitioner was only told in a vague manner of the dangers and disadvantages of self-representation. Petitioner was advised in a very brief fashion that he would have to comply with the rules of evidence, and the rules of court. There is nothing in the waiver record to show Petitioner understood the rules of evidence or what court rules the judge was referring to during the colloquy. The judge did not make any effort to find out the source of the friction between defense counsel Loy and Petitioner. Many defendants before trial express problems with their defense attorneys which are solved by the trial judge engaging the defendant in a *specific colloquy about the nature of the problem.*

Petitioner had a pending murder charge in Berkeley County at the time of the waiver hearing. A murder conviction in Dorchester County could be used, and was used, as an aggravating circumstance that would justify the state seeking—or threatening to seek—the death penalty against Petitioner in a future trial in Berkeley County. See S.C. Code §16-3-20 (C)(a)(2) (the aggravating circumstances that "the murder was committed by a person with a prior conviction for murder.") Yet, the Berkeley County murder case was only mentioned in passing during the waiver hearing to impress upon Petitioner the seriousness of what he was doing.

Conversely, in State v. Barnes, 407 S.C. 27, 31, 753 S.E.2d 545, 548 (2014), this Court ruled Barnes would have been allowed to represent himself where he "demonstrated an understanding of the process of capital *voir dire*, stated his intention to pursue a third-party guilt defense at trial and

discussed relevant case law, the burden of proof, and his right to testify." Barnes also answered the judge's detailed inquiries about the problems with his defense attorneys and the "trust issues" about why he felt betrayed. Id. at 32, 753 S.E.2d at 548. Barnes also demonstrated he had read relevant case law and showed some understanding of the rules of evidence when questioned by the trial judge. Id. at 33, 753 S.E.2d at 548. None of the factors in Barnes, which evidenced an intelligent waiver of the right to counsel and that the defendant was proceeding with the full understanding of the dangers and disadvantages of self-representation, exist in the record before this Court.

Petitioner is similarly situated to the defendant in State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) where this Court held the record did not demonstrate a knowing and intelligent waiver of the right to counsel with a full understanding of the dangers and disadvantages of self-representation. See Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990); Cf. State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). Respectfully, this Court should hold the trial court erred by allowing Petitioner to waive his right to counsel and proceed *pro se*.

CONCLUSION

Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari and order full briefing on the questions presented.

Respectfully submitted,

By: M M Caudy

Lara M. Caudy
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 8th day of February, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2015-UP-501 (S.C. Ct. App. Filed October 28, 2015)
2008-GS-18-0009

THE STATE,

RESPONDENT,

V.

DON-SURVI CHISOLM,

PETITIONER

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 Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Don-Survi Chisolm, #347831, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, and the South Carolina Court of Appeals, this 8th day of February, 2016.

By: _____

Lara M. Caudy
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of February, 2016.

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

SCCID
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Robert M. Dudek, Chief Appellate Defender
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February 8, 2016

Melody J. Brown, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Don-Survi Chisolm

Dear ~~Ms. Brown~~ Melody:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/smf

Enclosures

cc: Court of Appeals