

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

James R. Barber, III, Circuit Court Judge

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MAR -2 2016

SC SUPREME COURT

DERRICK LAMAR CHEEKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002310

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to object to the prejudicial prior bad acts evidence and negative character testimony from drug users and dealers who aligned themselves with petitioner because the result was the denial of petitioner's right to a fair trial in the case.

STATEMENT

Petitioner Derrick Lamar Cheeks was convicted of trafficking in crack cocaine in excess of 400 grams and possession of crack cocaine with intent to distribute within proximity of a school during the October 2010 term of the Spartanburg County General Sessions Court before Judge Roger L. Couch. Jeff Wilkes represented petitioner at trial and Assistant Solicitor Eddie Hunter appeared on behalf of the state.¹ Petitioner was sentenced to imprisonment for an aggregate period of twenty-five years. App. 1 – 475.

Petitioner appealed, but his convictions and sentences were affirmed.² See State v. Derrick Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). App. 477 – 483.

On June 21, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 484 – 491. On July 10, 2014, the respondent filed a return requesting that a hearing be held in the case. App. 492 – 495.

A PCR hearing was held on September 3, 2015, at the Spartanburg County Courthouse before Judge James R. Barber. App. 496 – 582. Petitioner was present at the hearing and represented by Christopher D. Brough, and Assistant Attorney General Justin J. Hunter appeared on behalf of the state.

On November 2, 2015, Judge Barber issued an Order of Dismissal in the case. App. 583 594. Petitioner appealed. This petition follows.

¹ Petitioner was tried jointly with codefendant Ricky Cheeks, who was found guilty of one count of trafficking in crack cocaine in excess of one hundred grams, one count of trafficking in crack cocaine in excess of 400 grams, and possession with intent to distribute within proximity of a school.

² However, in State v. Derrick Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), the Court overruled Soloman v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) by striking down as improper the jury instruction that “actual knowledge of the presence of a drug is strong evidence of intent to control as distribution or use.” App. 477 – 483.

ARGUMENT

Trial counsel erred in failing to object to the prejudicial prior bad acts and negative character testimony from drug addicts and dealers who aligned themselves with petitioner because the result was the denial of a petitioner's right to a fair trial.

On June 4, 2009, Police Officers Craig Hanning and Matt Hutchins executed a search warrant at the Spartanburg County residence of Tracey Markley where they saw crack cocaine on the kitchen counter. Both petitioner and Markley were found inside the residence, and petitioner was seen running away from the kitchen to a front bedroom. Ultimately, Markley and petitioner were arrested at the scene. App. 78, l. 6 – p. 83, l. 15; App. 109, l. 6 – p. 112, l. 14; App. 121, l. 22 – p. 124, l. 10.

The people who were frequent visitors at the Markley residence, mainly petitioner, co-defendant Ricky Cheeks, Eric Elder, and Christopher Johnson, were all under surveillance by police. The events on June 4, 2009, unfolded and transpired as follows:

- 1.) Eric Elder drove his vehicle into the Super 8 Motel parking lot in Spartanburg. Co-defendant Ricky Cheeks was seated in the passenger seat inside Elder's vehicle. App. 76, l. 21 – p. 77, l. 14.
- 2.) Petitioner, who was at the Super 8 Motel, exited, and then entered the vehicle with Elder and co-defendant Ricky Cheeks. App. 77, lines 14-18.
- 3.) Elder drove the vehicle to the Markley residence and all three men went inside the residence. App. 77, lines 18 – 19.
- 4.) Elder and co-defendant Ricky Cheeks left the Markley residence shortly thereafter to get baking soda from Walmart and then returned to the Markley residence. App. 103, l. 15 – p. 105, l. 17.
- 5.) Minutes later, Elder and co-defendant Ricky Cheeks left the Markley residence again, but were stopped by police for a traffic violation. A search of the car followed and crack cocaine was uncovered. Co-defendant Ricky Cheeks and Elder were charged. Petitioner was not charged for the drugs found in the car. App. 105, l. 19 – p. 109, l. 5.

- 6.) While the traffic stop of Elder and co-defendant Ricky Cheeks was in progress, another set of police officers executed a search warrant at the Markley residence. Markley and petitioner were inside the residence and subsequently arrested at the scene in connection with the crack cocaine found on the kitchen counter. App. 78, l. 6 – p. 83, l. 15; app. 109, l. 6 – p. 112, l. 14; App. 121, l. 22 – p. 124, l. 10.

During the PCR hearing held in the case, petitioner testified and explained in effect that trial counsel was ineffective in “allowing highly prejudicial testimony into the record **at trial**,” which specifically included the trial testimony of Elder and Markley, and testimony regarding the traffic stop and the drugs uncovered at that stop that occurred simultaneously while the Markley residence search was being conducted. App. 50, l. 20 – p. 51, l. 18. For example, Markley testified **at trial** and stated that he was in effect a crack addict and bought crack from petitioner in the past. Markley explained that he was smoking crack when the police arrived to execute the search warrant at his residence, and that petitioner was at his house cooking crack on the stove in his kitchen prior to the search. Markley added that he, Elder, and Johnson drove petitioner around presumably to deliver drugs. Also, Markley stated that petitioner would stash crack cocaine at his house. Moreover, Markley stated that the money seized from the house per the police search was in Chris Johnson’s suitcase and that the money belonged to petitioner or Johnson. Furthermore, Markley testified that Elder and co-defendant Ricky Cheeks had already left the house by the time police arrived to execute the search warrant on that date and that Elder and co-defendant Ricky Cheeks would drop drugs off and get money in the past. App. 293, l. 14 – p. 304, l. 21; App. 311, l. 2 – 24; App. 313, l. 21 – p. 314, l. 22.

In addition, Eric Elder testified **at trial** and stated that he and codefendant Ricky Cheeks picked up petitioner from a hotel on June 4, 2009, and took him to Markley’s house. Elder testified also that he had driven petitioner around 100 times or more. Elder stated that Christopher Johnson was another one of petitioner’s drivers. Elder added that after he dropped petitioner off at Markley’s

residence on the date in question, petitioner commenced cooking crack from the bag of cocaine that he (petitioner) had in his possession. Elder stated that he and co-defendant Ricky Cheeks went to Walmart to buy baking soda on that same date and returned, but that he and co-defendant Ricky Cheeks were stopped by police when they left the residence again in order to make a crack cocaine delivery, and that crack cocaine was found per a police search of their vehicle at that time. App. 249, l. 10 – p. 259, l. 16. They were both charged with trafficking in crack cocaine from that traffic stop. App. 269, l. 24 – p. 270, l. 1.

Petitioner testified at the PCR hearing and complained that trial counsel erred in failing to object or move for a mistrial when the prejudicial bad acts evidence and negative character testimony from Markley and Elder about the entire drug cooperative acts between them and the traffic stop surfaced because this evidence sealed the state's case against him by his association with these two two crack addicts and deliverers, especially since petitioner had nothing to do with and was not indicted on the drugs uncovered at the traffic stop. App. 511, l. 3- App. 515, l. 25; App. 518, l. 9 – p. 520, l. 16. The testimony of Markley and Elder constituted evidence that portrayed petitioner as thoroughly entrenched in the world of crack cocaine dealing for years, which in turn suggested that petitioner had the predisposition and criminal propensity to engage in the sale and manufacture of crack cocaine and was more likely than not guilty as charged on the state's crack cocaine charges for which he was on trial. App. 530, l. 18 – 20. App. 503, l. 16 – p. 504, l. 17; App. 505, l. 1 – 4; App. 507, l. 2 – 13. Petitioner stated that the supporting affidavit for the search warrant referred to him being under surveillance for his connection to drugs and drug sales. App. 507, l. 14 – p. 509, l. 13; App. 521, l. 14 – p. 523, l. 20; App. 537, l. 20 – 22. Also, petitioner stated that the jury was led to believe that he gave Elder and co-defendant Ricky Cheeks crack cocaine to deliver when they were stopped for a traffic violation. App. 540, l. 18 – 25; App. 534, l.

2 – 11. Petitioner added that his defense was that he was merely present at trial. App. 530, l. 13 – 17.

Trial counsel testified at the PCR hearing and admitted that Elders’ and Markley’s testimony ended up being prejudicial, but not so prejudicial that objections were needed. App. 557, l. 8 – p. 558, l. 21.

The PCR judge ruled that petitioner “failed to meet his burden of proving that counsel was ineffective for failing to make a motion to exclude character and prior bad act evidence before the trial” because this evidence was not “objectionable” evidence in light of counsel’s trial strategy in not bringing added attention to the testimony and evidence in question. App 592 – 593.

This case could have started and ended with testimony regarding the execution of the search warrant at the Markley residence and the arrests of petitioner and Markley thereafter. The testimony of Elder and Markley brought out prejudicial prior bad acts and negative character evidence that inoculated the jurors with information regarding a drug enterprise headed up by petitioner that existed for many years, which resulted in an unfair trial as this clearly exceeded the scope of the charges in the indictment against petitioner that specifically limited to the case to the drugs found at the searched residence on June 4, 2009. For example, Markley indicated that petitioner had multiple drivers (including him) who drop drugs off and that his profits from the drugs were enclosed in Christopher Johnson’s suitcase in Markley’s room in the residence. App. 295, lines 15 – 21; App. 311, lines 9-20. Markley indicated that petitioner routinely cooked crack in the kitchen of this residence and that he was neat and orderly in the process. App. 296, lines 14 – 25; App. 300, lines 2 – 13; App. 301, l 25 – p. 302, l. 11. Elder testified that he watched petitioner cook crack numerous times in Markley’s residence and that he was a driver who drove petitioner around and

would deliver the crack that petitioner cooked, and that other drivers would do the same. App. 251, l. 2 – 18; App. 257, l. 10 – p. 258, l. 10; App. 270, l. 13.

Finally, testimony regarding the police search of Elder's vehicle where crack cocaine was found that occurred after Elder and Ricky Cheeks left the Markley residence on the day in question was used as evidence via mere association to convict petitioner, and the prejudice of this constituted irreparable damage because petitioner was neither indicted for nor tried on the drug charges that emanated from that traffic stop. The traffic stop of Elders and co-defendant Ricky Cheeks was irrelevant to the case against petitioner emanating from the search of Markley's residence. All of the evidence outlined above constituted improper and prejudicial character evidence and prior bad acts evidence.

In State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001), the Court held as follows:

Character Evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998). Rule 404(a), SCRE, states the general rule that "[e]vidence of a person's character or a trait of character if not admissible for the purpose of proving action in conformity therewith on a particular occasion."

In State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998), the Court held;

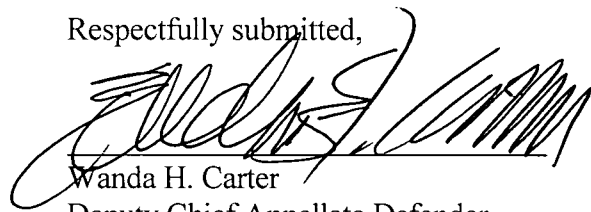
In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). In a similar vein, evidence of other crimes of bas acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). Both rules are grounded on the policy that character evidence is not admissible "for purposed of proving that the accused possesses a criminal character of has a propensity to commit the crime with which he is charged." State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 362 (1990).

Counsel's error in failing to object to and move to suppress the evidence at issue during petitioner's trial constituted deficient performance on petitioner's behalf in violation of petitioner's Sixth Amendment right to effective assistance of counsel in a criminal trial. See Strickland v. Washington, 466 U.S. 668 (1984). But for the error, a reasonable likelihood exists that the outcome of the trial would have been different.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant petitioner's petition for writ of certiorari and allow full briefing on the above-raised issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2016.

STATE OF SOUTH CAROLINA

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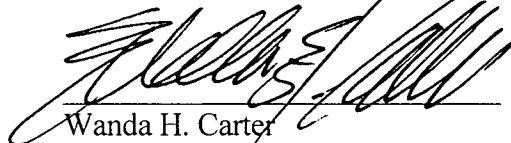
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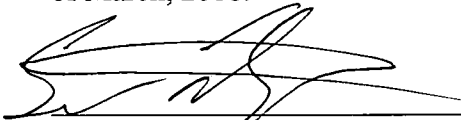
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick Lamar Cheeks, #343108, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 2nd day of March, 2016.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of March, 2016.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.