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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000358

Allen J. Gathings, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED BY PETITIONER

Did appellate counsel provide ineffective assistance by failing to raise on appeal all grounds on which the trial judge ruled where (1) the trial judge's alternative rulings were obvious in the transcript, (2) long-standing appellate procedural law requires affirmance when all grounds on which the trial judge ruled are not appealed, and (3) there is a reasonable probability Petitioner would have prevailed on appeal had all grounds been raised to the appellate court?

STATEMENT OF THE CASE

In September 2007, the Marlboro County Grand Jury indicted Applicant for two counts of murder (2007-GS-34-887, -888) and one count of grand larceny (2007-GS-34-909). Emily M. Crayton, Esquire, and J. Richard Jones, Esquire, represented Applicant. On October 18-21, 2010, Applicant proceeded to trial before the Honorable Howard P. King and a jury. The jury found Applicant guilty as indicted. Judge King sentenced Applicant to consecutive terms of life imprisonment without the possibility of parole for the murder convictions, and a concurrent term of five (5) years imprisonment for the grand larceny conviction.

Applicant filed a timely notice of appeal, and Elizabeth Franklin-Best, Esquire ("appellate counsel"), perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 22, 2012. State v. Gathings, Op. No. 2012-UP-494 (S.C. Ct. App. filed August 22, 2012). The remittitur was returned to the circuit court on September 7, 2012.

Petitioner filed an application for post-conviction relief on October 16, 2012. (App. p. 759-766). Respondent ("the State") filed a return on or about February 22, 2013. (App. p. 767-771) The Honorable Thomas A. Russo ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Darlington County Courthouse on July 24, 2014. (App. p. 772.) Petitioner was present and represented by James Marshall Biddle, Esquire, and Joshua L. Thomas, Esquire was present on behalf of the South Carolina Attorney General's Office. (App. p. 772). The post-conviction relief judge denied relief in an order signed September 8, 2014 and filed September 30, 2014. (App. p. 846-858.) The Petitioner filed a notice of appeal on February 11, 2015.

Petitioner filed a Petition for Writ of Certiorari on or about November 6, 2015, to which the State now files its return.

STANDARD OF REVIEW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). This standard is the same for both trial and appellate counsel.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id.

(citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

When reviewing questions of fact, this Court will affirm the post-conviction relief judge's grant of relief "if there is any probative evidence to support those findings." Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). Conversely, the Court will not uphold a finding that is not supported by probative evidence. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and can reverse the post-conviction relief judge when a decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387 (U.S.S.C. 2015) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

Specifically regarding appellate counsel, they need not, and perhaps should not, raise every nonfrivolous claim, "but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765 (2000) (referring to Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983)). In a review of the strength of the issues appellate counsel raised, [s]ignificant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the

presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

ARGUMENT

I. Probative evidence exists to support the post-conviction judge's finding that appellate counsel was not ineffective in her presentation of the issues on appeal

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. In particular, there is no evidence to dispute the finding that "Applicant has failed to demonstrate the outcome of his appeal would have been different had appellate counsel raised this issue. Anderson, 354 S.C. at 4343, 581 S.E.2d at 835." (App. p. 855, referring to Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003).) As discussed above, the burden rests on the Applicant in a post-conviction relief matter to overcome the strong resumption of adequate assistance and decisions made in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. In this matter, the post-conviction relief judge stated, "I am not aware of anything that's in this record that would cause me to believe that anything that the attorneys did or did not was deficient. Or that that would have created any issue that would have changed the outcome." (App. 844, lines 15-19.)

Petitioner's argument has two parts that must be unfolded separately in order to conduct a proper analysis. The overarching argument of Petitioner is that appellate counsel was ineffective when she failed to raise all grounds on which the trial judge based a controversial ruling, because this could have influenced the outcome of the appeal. It appears that the Court of Appeals agreed with this theory, as order affirming conviction cites the "two issue rule" – "Under the two issue rule, where a decision is

based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." (App. p. 757 (citing Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) and Rule 220(b), SCACR).) Petitioner, in its petition for writ of certiorari, continues on to evaluate the several grounds on which the trial court based its ruling. Respondent submits, however, that it is necessary to review the brief of appellant in the direct appeal and closely compare it to the allegations raised in the petition for writ of certiorari.

The trial court ruling from which all of these arguments stem is the allowance of evidence of prior bad acts. During pretrial motions, the trial judge ruled that evidence of Petitioner's prior convictions from an incident with the victims would be admissible.[1] In particular, the trial judge states that he found it admissible pursuant to "State v. Lyle[2] and 404(b)[3]; that the probative value outweighs prejudicial effect, and further that it is admissible under State v. Williams." (App. p.74, line 23-p.75, line 2.) These admissions were made over the objections of defense counsel, and these objections were renewed throughout the trial. These rulings were the sole issue presented by appellate counsel in her brief before the Court of Appeals.

It is now Petitioner's argument that appellate counsel as ineffective because she did not raise all aspects of the judge's ruling (i.e., "alternative rulings"). Petitioner breaks these down into three alternative rulings: 1) admissible under Lyle or SCRE 404(b); 2) more probative than prejudicial as described in SCRE 403; and 3) admissible to show animus under Williams. Upon review of the petitioner's brief before the Court of Appeals, it seems that her focus was in discounting the prior bad acts as a whole, rather

[1] The ruling is at page 72, line 21 – page 75, line 2 of the Appendix.
[2] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).
[3] South Carolina Rule of Evidence 404(b).

than analyzing each of the reasons why the trial judge allowed them to be presented at trial. Based on the Court of Appeals' ruling, this was not the preferred format for analysis, and the conviction was affirmed pursuant to the aforementioned "two issue rule."

Assuming, *arguendo* and with the implication from the Court of Appeals, that appellate counsel should have analyzed this issue differently, appellate counsel can still not be found ineffective because her decisions regarding how and what to brief did not prejudice the Petitioner in terms of a Strickland evaluation. Because Petitioner has briefed the three alternative rulings separately, Respondent will follow this format for the sake of clarity.

Lyle and Rule 404(b), SCRE

The case law and rules governing the allowance of prior bad act evidence as outlined by the Petitioner on pages 15-6 of the petition for writ of certiorari are undeniably the law of this state on this issue. However, the application of these standards remains a job for trial judges. The argument made by Petitioner now and in his appeal is that the trial judge erred in his evaluation of the various elements and came to an improper conclusion regarding admissibility. This is contrary to the findings of both the trial and post-conviction relief judges, whom found that the evidence was clearly admissible to show a common scheme or plan.

Respondent does not dispute the case law presented by Petitioner in this analysis; however, Respondent certainly disagrees with Petitioner's analysis. Petitioner compares these crimes to those in State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993), which dealt with a death resulting from beating injuries and, during the trial of which, *in camera*

witnesses were offered to testify to a prior altercation between the parties. These instances were deemed not to be similar enough to allow the evidence. In contrast to Parker, Respondent offers State v. Hallman, which Petitioner actually used in the brief on direct appeal to show the type of similarity needed to allow in evidence of prior bad acts. Though Petitioner alleged that the evidence in the case at bar did not match the level of similarity in Hallman, Respondent disagrees. Though Hallman dealt with sexual abuse in a foster home, there are descriptions that readily apply to this case – a special relationship existed between the defendant and victims, the extent of the abuse grew more severe over each occasion, and each altercation arose under similar circumstances. Certainly, these can all describe the case at bar, where Petitioner lived with the victims, his harm toward them escalated, and both incidents arose in the home that they shared. In fact, many cases discussing similarity between offenses look at similarity of victims; certainly the fact that these are the same victims proves substantial similarity. To put it more succinctly, "[w]hen a criminal defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan." State v. Martucci. 380 S.C. 232, 255, 669 S.E.2d 598, 610 (Ct.App.2008) (citing State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App. 1999).) "When a review of all pertinent factors establishes a 'close degree of similarity,' no further analysis is necessary; the evidence is admissible." State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct.App. 2013) (citing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009).)

As for proximity in time, Respondent argues that the trial judge properly discounted the time between the events to allow for the period of Petitioner's incarceration for the first offenses. Though Petitioner alleges (without citation to any

testimony) that "there were no hard feelings among the parties as evidence by Robbie and Loyce allowing Petitioner to live with them after release," Respondent submits that sharing a home and harboring ill will toward someone are not mutually exclusive. Therefore, the trial judge did not err in his evaluation of the time between incidents, as only two months had elapsed between Petitioner's release and the second offenses.

When considering motive and intent as exceptions to the rules espoused by Lyle and Rule 404 (b), Petitioner sites to State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) for the proposition that there must be "some connection of cause and effect between the evidence and the crime" in order to allow evidence of previous difficulties." Id., 275 S.C. at 296, 270 S.E.2d at 128. Respondent submits that the more appropriate cases are more recent ones, all of which stand for the proposition that "evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide." State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Though Williams and the concept of animus was an alternative ruling in itself to be considered more below, it certainly suits this analysis. On page 18 of the petition for writ of certiorari, Petitioner cites a sentence from State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001), that specifically bolsters Respondent's case, yet Petitioner maintains that the "evidence of previous quarrels and ill feelings or hostile acts between parties" do not necessarily mean bad acts. Though this Court in Braxton did state that testimony regarding an argument "did not refer to any bad act by appellant," this Court has, nonetheless, engaged in the same 404(b) analysis that is at issue here. Unfortunately, there is little, if any, available testimony about motive as both victims are deceased and Petitioner did not testify on his own behalf.

For the above reasons, Respondent submits that the prior bad act evidence was admissible under Lyle and Rule 404(b), and that appellate counsel did not cause any prejudice to Petitioner in her briefing of the issue.

Animus

Very similar to the above analysis is that regarding animus. The cases of Braxton and Williams were cited by both the post-conviction relief judge and Petitioner, though for different points. Petitioner argues that, under Braxton, any evidence allowed under the stated exception should not be of criminal acts, but rather should be of arguments or disagreements, for example. State v. Clinkscales, 231 S.C. 650, 654, 99 S.E.2d 663, 665 (1957), is also cited as being in support of this proposition, yet it contains the language, "in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible[.]"

Petitioner pursues the point that the trial judge further erred in allowing testimony regarding specific facts of the 2005 incident, as this line of cases forbids this as evidence. Respondent submits that this is harmless error. Because the trial judge weighed the probative versus prejudicial nature and relevance of the earlier conviction, and particularly in light of other evidence of the Petitioner's guilt, the fact that the jury heard details of the prior incident and convictions was not fatal to the case. For the above reasons, Respondent submits that the prior bad act evidence was admissible to show animus, particularly under Williams, and that appellate counsel did not cause any prejudice to Petitioner in her briefing of the issue.

Rule 403, SCRE

Respondent submits that the evaluation of this issue – whether the evidence was more probative than prejudicial – is similar to the evaluation of the evidence pursuant to Rule 404(b) and Lyle in that the case law is apparent and undisputed, but the application of the case law to the facts makes all the difference. Respondent does not dispute Petitioner's outlining of the definition of "probative" and the value of probative evidence. This Court has defined "unfair prejudice" as "an undue tendency to suggest a decision on an improper basis." Scott, 405 S.C. at 506, 748 S.E.2d at 245. (citing State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct.App.2013) (citation omitted).)

Based on all of the evidence before him, the trial judge found that the evidence regarding prior bad acts was relevant and more probative than prejudicial so, therefore, any decision based on this information was made on a proper basis. "A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct.App. 2013) (citing State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App.2008) .)

Petitioner argues that a proper balancing of probative versus prejudicial would lead most judges to prevent the admission of this evidence. Respondent respectfully disagrees. "The acid test of admissibility is the logical relevancy of the other crimes." Martucci, 380 S.C. at 255, 669 S.E.2d at 610. (citing State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Quite simply, it made sense for the evidence of these prior convictions to come into evidence when the defendant was charged with attacking the same individuals in the same circumstances in a temporally close frame. For

the above reasons, Respondent submits that the prior bad act evidence was more probative than prejudicial, and that appellate counsel did not cause any prejudice to Petitioner in her briefing of the issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court deny a writ of certiorari to review the post-conviction relief judge's proper findings of effective performance of appellate counsel.

Respectfully submitted,

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By: _____
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March 24, 2016

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CERTIFICATE OF SERVICE

I, Jessica E. Kinard, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 24th day of March, 2016.

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ALAN WILSON
ATTORNEY GENERAL

March 24, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Allen J. Gathings v. State of South Carolina**
Appellate Case No. 2015-000358
Lower Court Case No. 2012-CP-34-0217

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Jessica E. Kinard
Assistant Attorney General
S.C. Bar # 77889

JEK/jacc
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services (without enclosure)