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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

G. Thomas Cooper, Jr., Circuit Court Judge

WILLIAM V. LONG

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2016-000013

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

Defense counsel was ineffective in failing to object to an indictment
being sent back to the jury on a kidnapping charge for which
petitioner was not on trial because the wrong indictment placed
petitioner's character into issue and suggested criminal propensity.....4

CONCLUSION7

PETITION TO BE RELIEVED AS COUNSEL.....8

ISSUE PRESENTED

Whether defense counsel was ineffective in failing to object to an indictment being sent back to the jury on a kidnapping charge for which petitioner was not on trial when the wrong indictment placed petitioner's character into issue and suggested criminal propensity?

STATEMENT

Petitioner was convicted of two (2) counts of armed robbery and possession of a weapon during the commission of a violent crime after a jury trial held before the Honorable Edward B. Cottingham on April 13-15, 2009, in Horry County. Respective consecutive sentences of twenty-five (25) years, twenty-five (25) years, and five (5) years were imposed. James C. Galmore, Esquire was trial counsel. Lawrence R. Filiberto, Esquire was the assistant solicitor. (App. p.1 – p. 396)

Petitioner appealed his convictions and they were affirmed by the Court of Appeals on March 7, 2012. State v. Long, Opinion No. 2012-UP-166.

Petitioner filed an application for post-conviction relief on November 29, 2012. (App. p.397 – p. 409) Respondent filed a return dated March 15, 2013. (App. p.410 – p. 414) An amended application was filed on July 23, 2013. (App. p.415 – p.419) An evidentiary hearing was held on February 4, 2015, before the Honorable G. Thomas Cooper. Petitioner was represented by Scott Joye, Esquire. Respondent was represented by Joshua Thomas, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p.420 – p.474) On March 31, 2015, Judge Cooper issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p.475 – p.491) A motion to reconsider was denied on August 12, 2015. (App. p.492 – p.495)

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to object to an indictment being sent back to the jury on a kidnapping charge for which petitioner was not on trial because the wrong indictment placed petitioner's character into issue and suggested criminal propensity.

During jury deliberations in petitioner's trial it was brought to the trial court's attention that an indictment for a kidnapping that was unrelated to any charge for which petitioner was on trial was sent back to the jury for their deliberations along with all of the other charges for which petitioner was on trial. That indictment showed George T. Phillips as the victim. The jury even sent back a note wanting to know who George Phillips was. Defense counsel moved for a mistrial noting that the jury was exposed to another charge and that it was highly prejudicial. The trial court just dismissed the error as an erroneous indictment and a clerical error and instructed the jury in that fashion. (App. p.353, line 4 – p.361, line 15) Defense counsel failed to object to the erroneous indictment on the basis of improper character evidence and criminal propensity. He provided ineffective assistance of counsel in that regard.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid

a finding of ineffectiveness.” Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction on in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), the Court wrote:

In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280, S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: “Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules.” (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. See, e.g., State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. See, United States v. Johnson, 610 F.2d 194 (4th Cir.1979); State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. See, State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element, i.e., intent or motive, of the crime charged. See, e.g., State v. Lyle, *supra*; State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985); and State v. Huggins, 285 S.C. 361, 329 S.E.2d 759 (1985)

293 S.C. at 324-325, 360 S.E.2d at 319.


Credibility was a key issue in this case. In State v. Reeves, 301 S.C. 191, 391 S.E. 2d 241 (1990), the Court held that “error which substantially damages the defendant’s credibility cannot be held harmless where such credibility is essential to his defense.”

The cases cited above say that what was done is prejudicial. The trial court did not give a limiting charge on petitioner’s prior bad act. See, State v. Timmons, 327 S.C. 48, 448 S.E.2d 323 (1997). So the jury was free to view the prior bad act as propensity evidence.

CONCLUSION

Petitioner's convictions should be reversed.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY

G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

WILLIAM V. LONG

PETITIONER,

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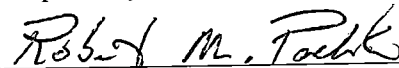
PETITION TO BE RELIEVED AS COUNSEL

Counsel for William V. Long states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 4, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for William V. Long.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of April, 2016

STATE OF SOUTH CAROLINA

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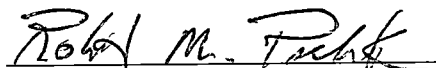
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2016-000013

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire and William V. Long, #238950, at Lieber Correctional Institution this 6th day of April, 2016.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of April, 2016.

Christian Ford (L.S.)

Notary Public for South Carolina
My Commission Expires: March 1, 2026.