

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

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MAY -7 2012

Deadra L. Jefferson, Circuit Court Judge

S.C. Supreme Court

THOMAS CURTIS HAMILTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in failing to request a curative instruction when the prosecutor commented before the jury that petitioner had two prior convictions for burglary and he did not take the stand?

STATEMENT

Petitioner was convicted of first degree burglary and petty larceny after a jury trial held before the Honorable R. Knox McMahon on June 5-6, 2006, in Charleston County. A sentence of life without parole (LWOP) was imposed for burglary, first degree and a five (5) year concurrent sentence was imposed for petty larceny. Martha Kent Runey, Esquire was trial counsel.

Petitioner appealed his conviction s and the Court of Appeals dismissed the appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Hamilton, Op. No. 2009-UP-448 (S. C. Ct. App. filed October 7, 2009).

Petitioner filed an application for post conviction relief on September 17, 2010. An evidentiary hearing was held on September 14, 2011, before the Honorable Deadra L. Jefferson. Petitioner was present and was represented by Edward K. Pritchard, III, Esquire. Respondent was represented by Matthew J. Friedman, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing.

On October 7, 2011, Judge Jefferson issued an order denying and dismissing the application for post-conviction relief. A Rule 59(e) motion was filed on October 12, 2011. Respondent made a return to the motion on October 21, 2011. Judge Jefferson denied the motion on October 25, 2011.

This petition follows.

ARGUMENT

Trial counsel was ineffective in failing to request a curative instruction when the prosecutor commented before the jury that petitioner had two prior convictions for burglary and he did not take the stand.

During petitioner's trial, an employee with Charleston County Clerk of Court's office testified that appellant had two prior convictions for burglary. (App. p. 147, lines 11-18). During closing argument, the prosecutor argued that petitioner had two prior burglaries. (App. p. 180, line 19 – p. 181, line 9). Petitioner never took the stand to testify. And trial counsel failed to ask for a curative charge on the mention of the two prior burglaries.

In Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991) the Court wrote:

To establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) that, but for counsel's errors, there is a reasonable probability the result would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984); Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989).

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) this 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 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. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987).

The Court has ruled before that “character evidence is so highly prejudicial that it is usually excluded under the fast rules.” State v. Ross, 272 S.C. 56, 249 S.E. 2d 159 (1978), citing State v. Britt, 235 S.C. 395, 111 S.E. 2d 669 (1959) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E. 2d 315 (1991).

Petitioner in this case had not taken the stand and he did not place his character in issue. Under Rule 608, SCRE, petitioner’s character could only be questioned on cross-examination on specific acts that show untruthfulness. Under Rule 609(b), SCRE the admission of prior similar crimes is very limited. In Colf v. State, 337 S.C. 622, 525 S.E. 2d 246 (2000) this Court wrote on the rule:

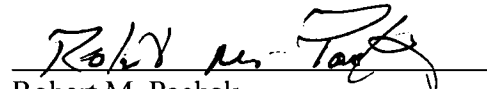
The Fourth Circuit Court of Appeals held the district court erred in apparently finding a remote prior conviction substantially more probative than prejudicial based on the similarity of the crimes. 664 F.2d at 418-19. On the contrary, the court noted, evidence of similar offenses inevitably suggests to the jury the defendant’s propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions. Therefore, “since evidence of any similar offense should be admitted only rarely, a similar conviction already presumptively barred from admission by Rule 609(b) should be admitted even more rarely.” Id. At 419. The trial judge here erred in treating the prior crimes as if their similarity heightened their probative value when it actually increased their prejudicial effect.

Trial counsel in this case was ineffective in failing to request a curative charge on the improper use of two prior similar burglary crimes.

CONCLUSION

Petitioner's writ should be granted and his convictions should be overturned.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

THOMAS CURTIS HAMILTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Curtis Hamilton 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 September 14, 2011. 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 Thomas Curtis Hamilton.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of May, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

THOMAS CURTIS HAMILTON,

PETITIONER,

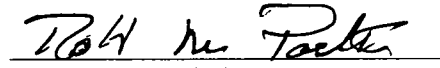
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

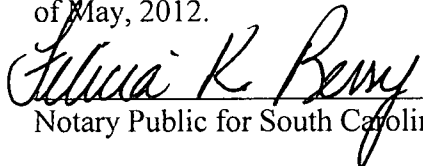
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire and Thomas Curtis Hamilton, #161339, at Lieber Correctional Institution this 7th day of May, 2012.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of May, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.