

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Deadra L. Jefferson, Circuit Court Judge

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S.C. SUPREME COURT

JOHN W. MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000820

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 state's publication of petitioner's three prior burglary convictions in order to prosecute him on a first degree burglary charge under 16-11-311(A)(2)¹ because the statute required proof of only two prior burglary convictions and as a result, the prejudicial value of admitting three priors outweighed the probative value and ultimately deprived petitioner of the right to a fair trial, particularly where the state's case against petitioner was comprised of only a single piece of evidence.

¹ (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

- (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both.

STATEMENT

Petitioner John W. Mack was convicted of first degree burglary and grand larceny per jury trial held during the February 2011 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole. Petitioner was sentenced to life imprisonment on the burglary conviction (LWOP) and five years on the larceny conviction. App. 1 – 169. Roger Poole represented petitioner at trial, and Assistant Solicitors Barry J. Barnette and Anthony L. Leibert appeared on behalf of the state. Petitioner appealed, but his appeal was dismissed. See State v. Mack, Op. No. 2013-UP-161 (Ct. App. filed April 17, 2013).

On May 6, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 171-183. The respondent filed a return dated March 18, 2014. App. 184-188. A PCR hearing was held on January 14, 2015, at the Spartanburg County Courthouse before Judge Deadra L. Jefferson. App. 190 – 247. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General Suzanne H. White appeared on behalf of the state.

On April 6, 2015, Judge Jefferson issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 250 – 278.

Petitioner appealed Judge Jefferson's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the state's publication of petitioner's three prior burglary convictions in order to prosecute him on a first degree burglary charge under 16-11-311(A)(2)² because the statute required proof of only two prior burglary convictions and as a result, the prejudicial value of admitting three priors outweighed the probative value and ultimately deprived petitioner of the right to a fair trial, particularly where the state's case against petitioner was comprised of only a single piece of evidence.

Petitioner was convicted of first degree burglary and grand larceny in this case. The state's case consisted of two components: the testimony from the homeowner whose home had been broken into and a forensic finding that the blood found inside the burglarized home matched petitioner's DNA. At trial, La Rhonda Moss testified that she was in Boone, North Carolina, visiting family and friends over the Labor Day weekend and that she returned to her home in Spartanburg County on September 6, 2005, to find that her home had been burglarized. The burglar took her television, VCR and jewelry. App. 45, l. 20 – p. 51, l. 25. Also, SLED forensic expert Manuel John Ortuno testified that the blood received from the crime scene matched petitioner's blood. App. 87, l. 7 – p. 107, l. 11. The DNA evidence was the only piece of evidence linking petitioner to the charges. Petitioner did not testify at trial and presented no witnesses in his defense.

² (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both.

Before the solicitor closed out the state's case in chief, petitioner's prior burglary record was stipulated to and presented to the jury as follows:

Mr. Leibert: Your Honor, finally, the state and the defense have stipulated the three exhibits. They are State's Exhibit's 4, 5, and 6.

Mr. Leibert: Your Honor, may I publish them to the jury?

The Court: You may.

Mr. Leibert: State's Exhibit 4, ladies and gentlemen, is an indictment, case No. 89-GS-42-2367, the State vs. John Willie Mack, indictment for burglary of a dwelling, wherein Mr. Mack was convicted of burglary in the first degree. State's Exhibit No. 5 is case No. 99-GS-42-0698, an indictment, State vs. John Willie Mack, indictment for burglary second degree, wherein Mr. Mack was convicted of burglary in the second degree. State's Exhibit No 6 is case No. 88-GS-42-1248, the State v. John Willie Mack, indictment for burglary third degree, wherein Mr. Mack was convicted of burglary in the third degree. Thank you...the state rests. App. 115, l. 19 – p. 116, l. 8.

The trial judge gave the following jury instruction in reference to petitioner's burglary priors in relation to the first degree burglary charge for which petitioner was on trial:

Section 16-11-311 provides that a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with the intent to commit a crime therein, and an additional factor, that when in effecting entry or while in the dwelling he is armed with a deadly weapon or causes physical injury to a person who's not a participant in the crime, or uses or threatens the use of a dangerous instrument, or displays what appears to be a knife or firearm, or the entering or the remaining of the burglary occurs in the nighttime, or the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking, or a combination of both. App. 146, l. 19 – p. 147, l. 6.

Now, in this case the state is alleging that the crime of burglary is in the first degree because the burglary was committed by a person with two or more prior convictions for the crime of burglary, and ...you have heard evidence regarding the defendant having previously been convicted of the crime of burglary. You are instructed that such evidence is offered for and may only be considered by your for a

very limited purpose...It is not being offered as proof of the defendant's commission of the crime of burglary for which he is now standing trial, nor may it be considered by you as evidence that the defendant did commit the crime of burglary. If you determine that the state has proven beyond a reasonable doubt that the defendant committed the crime of burglary, that is the entering of a dwelling without consent and with the intent to commit a crime therein, then you may consider the evidence of those prior burglary convictions as it relates to the issue as to what degree of burglary has been committed. App. 148, l. 21 – p. 149, l. 23.

During the PCR hearing, petitioner testified that counsel was ineffective in “fail[ing] to object to his prior criminal record being presented to the jury” in effect because all three “aggravating circumstances,” i.e. burglary priors, were needlessly submitted to the jury. App 205, l.3 – p. 206, l. 13.

The PCR judge ruled that counsel had no basis to object to petitioner's prior criminal history. App. 271 – 273.

The state was allowed to show at least two prior burglary convictions as an element of the first degree burglary charge for which petitioner was being tried under S.C. Code Ann. 16-11-311 (A)(2). See State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997)). Here, the state's case included a showing of three prior burglary convictions from petitioner's record. Therefore, the issue arose as to whether the admission of three prior burglary convictions, where only two prior burglary convictions were required, resulted in prejudice that outweighed the probative value at trial, particularly where the state's evidence presented against petitioner was underwhelming in that it was comprised of a single piece of forensic evidence without anything else. Note that no eyewitness identification existed in the case.

In State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), the Court cited to Old Chief v. United States, 519 U.S. 172 (1997),³ in holding that the probative value of presenting prior burglary convictions beyond the two required per the statute “decreases” because of the already sufficient evidence presented to prove that element. The James Court went on to hold that “although there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial and therefore proper, the potential for undue prejudice—for the impermissible interpretation of such evidence as propensity or character evidence—warrants great caution.” In James, the Court reversed and held that the trial judge erred in admitting evidence of seven of James’ prior burglary convictions because the “probative value of all seven of [his] prior burglary convictions was outweighed by the very great potential for prejudice to the defendant regardless of the trial judge’s limiting instructions.” The James Court acknowledged the holdings in State v. Hamilton, *supra* and State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), to the extent that the submission of two prior burglary convictions in a burglary prosecution under S.C. Code Ann 16-11-311(A)(2) would be acceptable and agreed that “if that state had submitted only two rather than seven priors then the jury would have had sufficient evidence to convict without prejudice; however, the James Court made it clear that prosecutions under 16-11-311(a)(2) required a Rule 403, SCRE, analysis as an evidentiary matter nonetheless in such cases where prior burglary convictions constitute an element in a first degree burglary prosecution under 16-11-311(A)(2). The James Court ruled that the probative value of the submission of seven prior burglaries committed to the jury was more prejudicial than probative. Rule 403, SCRE, states that “although

³ In Old Chief, *supra*, the Court held that it was more prejudicial than probative for the prosecution to rely on the defendant’s prior indictment for assault causing serious bodily injury to establish the offense of possession of a firearm by anyone with a prior felony conviction because the assault indictment prejudiced the defendant on the charge of assault with a deadly weapon which he was also on trial at that same time.

relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”

In the instant case, counsel did not object to the submission of petitioner’s three prior burglary convictions at trial (see App. 115, lines 24-25), and the trial judge did not conduct a Rule 403, SCRE analysis regarding the same. In applying the James holding in the case at bar, and James’ requirement that a 403 analysis be conducted in connection with the submission of prior burglary convictions via its rationale that the factual scenario is a factor in balancing the prejudicial value against the probative value in submitting proof of two or more prior burglaries, it is undoubtedly clear the use of three burglary priors against petitioner at his burglary trial under 16-11-311(A)(2) was more prejudicial than probative because the state’s case against him was underwhelming as there was only a single piece of evidence (forensic) presented against him in the case and as a result, an additional burglary prior beyond the two priors required increased the priors and increased the prejudice significantly as it appeared petitioner was guilty of the burglary for which he was on trial based on his prior criminal record.

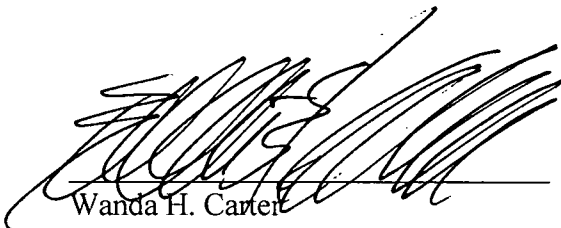
The Sixth Amendment guarantees effective assistance of counsel in criminal cases. See Strickland v. Washington, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, there must be proof that counsel’s performance fell below the objective standard of reasonableness, and that counsel’s deficient performance prejudiced the defendant’s case. Strickland v. Washington, supra. In the case at bar, counsel erred in failing to object to the prejudicial value of the use of three prior burglary convictions to convict petitioner of first degree burglary under S.C. Code Ann. 16-11-31(A)(2), where the state’s case against petitioner was comprised of a single piece of evidence only because but for counsel’s error in this regard, the outcome of the case might have been different. Therefore, the PCR court erred in denying PCR

relief to petitioner based on the standard announced in Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984), to the extent that there was no “any evidence” in existence to support the Order of Dismissal filed on this issue in the case at bar.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.

Respectfully submitted,

A large, stylized 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 7th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Deadra L. Jefferson, Circuit Court Judge

JOHN W. MACK,

PETITIONER,

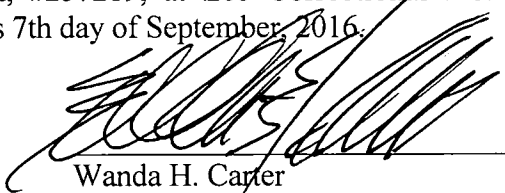
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

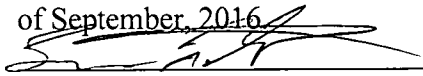
I certify that a true copy of the petition for writ of certiorari in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and John Willie Mack, #257219, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 7th day of September, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of September, 2016.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.