

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

ERIC D. PHILLIPS,

RESPONDENT/PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

ANDERS BRIEF OF APPELLANT
PURSUANT TO WHITE v. STATE

LANELLE CANTEY DURANT
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ATTORNEY FOR RESPONDENT/PETITIONER

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in not allowing Phillips to present opinion and reputation evidence of the victims' character pursuant to Rule 404 (a)(2), SCRE, which was prejudicial to appellant because a critical issue was whether the victim or appellant was the aggressor?

STATEMENT OF THE CASE

Eric Phillips was indicted on two counts of assault and battery with intent to kill (ABWIK) and one count of possession of a weapon during the commission of a violent crime. On October 16, 2006, he proceeded to trial before the Honorable James C. Williams and a jury. Phillips was represented by the late Gene Dukes, Esquire. The jury returned a verdict of guilty on each charge as indicted. Judge Williams sentenced Phillips to fifteen years on each ABWIK and to five years on the possession of a weapons charge. App. 516; App. 521; App. 526. The sentences were to be served concurrently. Phillips did not file a notice of appeal.

On February 6, 2007, Phillips filed an application for post-conviction relief (PCR). The state filed a return on July 27, 2007. An amended PCR application was filed June 10, 2009. An evidentiary hearing was held on June 10, 2009 before the Honorable Diane S. Goodstein. Judge Goodstein issued an order on January 25, 2010 granting Phillips' PCR application, and ordering a new trial. Judge Goodstein also granted Phillips a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The state filed a notice of appeal on February 22, 2010. Phillips' PCR attorney filed a notice of appeal on February 23, 2010. The state filed a Petition for Writ of Certiorari October 11, 2010. A Return to the State's Petition, a Petition for Writ of Certiorari, and this brief pursuant to White v. State, Id., and Rule 227(i)(1), SCACR are being filed simultaneously.

ARGUMENT

The trial court erred in not allowing Phillips to present opinion and reputation evidence of the victims' character pursuant to Rule 404 (a)(2), SCRE, which was prejudicial to appellant because a critical issue was whether the victim or appellant was the aggressor.

Eric Phillips was convicted of shooting John Griffin in the side and Griffin's brother, Gerald, in the hand during an altercation at the Waffle House on December 14, 2003. John Griffin and Phillips had words earlier in the evening when both were at a club called the "Farm." The issue concerned the child that Phillips allegedly had with Griffin's sister. App. 211 – 213.

Phillips and his girlfriend, Louvenia Lloyd, left and Phillips took her home. Phillips then went back out to the Waffle House for food where Griffin started the same argument again. Griffin had a group of men with him who all started approaching Phillips while they were still outside. A gun fell from someone else onto the ground in the group, and Phillips grabbed the gun and started shooting into the air to disperse the crowd. One of the shots hit John Griffin in his side, and another bullet hit Gerald Griffin's hand. App. 214 – 226. Phillips turned himself into the police at the precinct that night. App. 224 – 227.

At his trial, during defense counsel's direct examination of Phillips, Phillips testified that he was scared during the episode at the Waffle House with Griffin's men crowding around him, and when the pistol dropped because he feared they would shoot him. App. 224, ll. 1 – 25. Phillips said that when they were at the Farm, John Griffin threatened to kill him and shoot him. Phillips said he had heard about things "they had did." The solicitor

objected and the judge held an *in camera* hearing. App. 225, ll. 1 – 25; App. 226, ll. 1 – 25; App. 227, ll. 1 – 15.

During his proffer, Phillips testified that he had heard that the victims shot up the Villa Apartments during a card game. The judge, after completing some research, overruled the solicitor's objection, but told defense counsel not to go "any further into the matter." App. 229, ll. 1 – 25; App. 230, ll. 1 – 25. Defense counsel elicited only the testimony that Phillips was scared and believed he was in danger of being harmed. App. 231, ll. 1 – 25.

Rule 404(a)(2), SCRE, provides evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except that evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

The defendant has the right to attack the reputation of the prosecuting witness for violence, but it cannot be done by showing specific instances of violence. State v. Boyd, 126 S.C. 300, 119 S.E.2d 839 (1923).

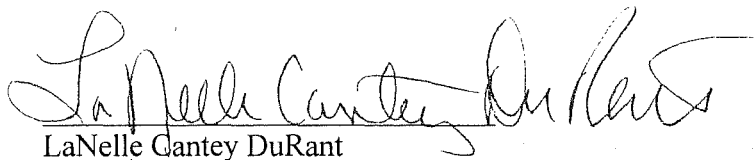
Although the proffered testimony was not admissible, the judge should have allowed trial counsel to ask Phillips concerning his opinion of the victims' reputation in the community for violence. At his PCR hearing, Phillips testified that John Griffin had a reputation in the community for being an aggressive and dangerous person. App. 408 – 411.

¹ This would have been a merits brief except that trial counsel did not preserve the issue and did not proffer reputation evidence of the victim during the proffer. This evidence was elicited at the PCR hearing.

CONCLUSION

Based on the above, the convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

This 2nd day of March, 2011.

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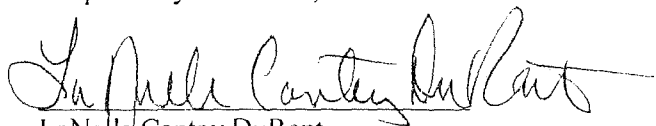
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric D. Phillips states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Diane Schafer Goodstein, which was held on June 10, 2009, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Eric D. Phillips.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon Mary S. Williams, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and on Eric D. Phillips, #318162 at Macdougall Correctional Institution, this 2nd day of March, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017