

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

G. Thomas Cooper Circuit Court Judge

ELBERT WALLACE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000057

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Was trial counsel ineffective when he failed to object to testimony of a K-9 track offered by the State without proper foundation?
2. Was trial counsel ineffective for failing to call an essential witness?
3. Was appellate counsel ineffective for failing to argue improper joinder during Petitioner's direct appeal?

STATEMENT OF THE CASE

Petitioner was indicted at the March 2009 term of the Richland County Grand Jury for Burglary in the First Degree (2009-GS-40-0988), Armed Robbery (2009-GS-40-0989), Assault and Battery with Intent to Kill (2009-GS-40-0997), Burglary in the First Degree (2009-GS-40-1225), Armed Robbery (2009-GS-40-1228), and Murder (2009-GS-40-1229), and during the April 2010 term of the Richland County Grand Jury for Burglary in the Second Degree (2010-GS-40-1230) and Petit Larceny (2010-GS-40-1229). He was represented by Tivis Sutherland, Esquire during his jury trial July 18-21, 2011 before the Honorable Clifton B. Newman. After verdict he was convicted as indicted for all indictments except the Petit Larceny for which he was acquitted. Judge Newman sentenced Petitioner to a mandatory life without parole sentence pursuant to S.C. Code Ann. § 17-25-45 for the First Degree Burglary under indictment 2009-GS-40-1225, the Armed Robbery under indictment 2009-GS-40-1228, and Murder under indictment 2009-GS-40-1229. The other sentences were imposed as follows:

Burglary 2 nd Degree, 2010-GS-40-1230	15 years	
Burglary 1 st Degree, 2009-GS-40-0988	30 years	consecutive
Armed Robbery, 2009-GS-40-0989	30 years	consecutive
ABWIK, 2009-GS-40-0997	20 years	

Petitioner filed a notice of appeal and was represented by Appellate Defender Susan B. Hackett. Following briefing, the South Carolina Court of Appeals affirmed the Applicant's convictions and sentence by unpublished opinion. State v. Elbert Wallace, 2013-UP-165 (Ct. App. Filed April 24, 2013). The Remittitur was sent on May 31, 2013.

Petitioner filed his initial Application for post-conviction relief on December 16, 2013. Counsel for Petitioner filed a Second Amended Application on or about July 6, 2015 and a Third Amended Application with the State's consent on July 15, 2015.

On July 15, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper at the Richland County Courthouse. Kirsty Goldberg, Esquire, represented the Petitioner at the hearing. Assistant Attorney General J. Clayton Mitchell represented the Respondent. In a written order signed December 23, 2015, Judge Cooper denied the application. A timely notice of intent to appeal was served and filed. This petition for writ of certiorari follows:

ARGUMENT

1. Trial counsel was ineffective for failing to object when testimony of a K-9 track was offered by the State without the proper foundation.

In State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007), evidence was offered that a law enforcement K-9 followed a track from the scene of a robbery to the defendant found sleeping in bushes. The State moved to have the K-9's handler qualified as an expert in K-9 tracking and the Court allowed him to be duly qualified over the Defense's objection. White appealed and argued that dog tracking evidence did not satisfy the standard for "scientific based" expert testimony and therefore shouldn't have been allowed to be presented as expert testimony. The Court of Appeals held this type of testimony could be admitted under an "experience-based knowledge" theory of expert testimony. *Id.* The Court held that dog tracking evidence has historically been considered as generally reliable in our courts. *Id.* Further, in this particular case, there was evidence offered of the handler's extensive training and experience and the dog's history, certifications, skills, the number of tracks he had done, and additional information providing a basis for the reliability of the dog's actions. *Id.*

The case was appealed to the Supreme Court in State v. Gary A. White, 382 S.C. 265 (2009), which noted that the Court of Appeals opinion contained a thorough analysis of this country's jurisprudence on the issue. However, the Court was concerned that the foundational requirement for this type of expert testimony varies in jurisdictions. To that end the Court held:

"To provide uniformity, we think it advisable to adopt the following evidentiary framework to guide our bench and bar concerning dog tracking evidence. By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if 1) the evidence shows the dog handler satisfies the qualifications of an

expert under Rule 702; 2) the evidence shows the dog is of a breed characterized by an acute power of scent; 3) the dog has been trained to follow a trail by scent; 4) by experience the dog is found to be reliable; 5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and 6) the trail was not otherwise contaminated.” *Id.* at 272.

The Applicant’s trial transcript reflects that the only witness to provide testimony regarding the K-9 track was Deputy Alexander. The transcript reflects that Deputy Alexander was not the dog’s handler. App. 282 – 284. Specifically, Deputy Alexander testified “I assisted the K-9 with the track as a backup up unit or a cover” and “[M]y primary job with the K-9 was like an officer is focused on the dog and watching his reactions. My job was to scan the area, watch the --- basically watch the deputy’s back and cover all sides.” App. 282, ll. 8-11. Deputy Alexander continued on to explain that he “ran a track with the K-9 unit” and “[W]e established the track going around the back of the house, and it proceeded through the wood line. It brought us out at the church over here, at what time we lost the track in the parking lot area. As the K-9 officer doubled back to try to re-establish the track to see if he might have gotten off-line, we found broken glass, at what time we found an entry point and cleared the church.” App. 283. Deputy Alexander testified that they were not able to re-establish the K-9 track after this point. *Id.*

As stated above, the testimony was not offered by the K-9 handler and accordingly there was no evidence offered regarding his qualifications as an expert dog handler. Also, there was no evidence presented to show the “dog is of a breed characterized by an acute power of scent,” that the “dog has been trained to follow a trail by scent,” or that “by experience the dog” has been found to be reliable. *See, White*. Factually, there also was no evidence presented that the

dog was “placed on the trail where the suspect was known to have been within a reasonable time” or what a reasonable time is within industry standards, or what scent the dog was using. *Id.* Finally, there was no evidence presented that the trial “was not otherwise contaminated.” *Id.*

The testimony wasn’t presented to the jury as expert testimony. Petitioner submits this is the type of testimonial evidence that can and should be offered by an expert who is qualified to have an opinion regarding how the use of the K-9 was implemented and what the dog’s findings mean. The K-9 evidence was used in the State’s argument for joinder of the indictments for trial. The Assistant Solicitor argued, “Richland County was called out to Ms. Webb’s house, and they brought a K-9 unit with them. The K-9 Unit tracked from Ms. Webb’s house, which was at 1313 Winyah Drive to 1323 Winyah Drive, which is the Christ Lutheran Church, which is on the corner. The church is on the corner of Ms. Webb’s house, the house that is next to the church. There are some woods that separate those two incident locations. When the K-9 tracked to 1323 Winyah Drive, which is the church, officers observed an open door and a busted out window.” App. 37. The joinder of indictments in this case resulted in the Petitioner being tried for an armed robbery and assault, a separate burglary of a church, and a separate home invasion and murder all at the same time. If this K-9 testimony was the only link between two of these incidents it is probable that the joinder may have been found as inappropriate had a proper objection been made at the beginning of the trial. Improper joinder of the indictments of separate incidents would be prejudicial to the Applicant.

Further, the Solicitor believed this evidence was important enough that it was mentioned in testimony, in their opening statement, and in their closing argument. In the opening statement, the Solicitor argued:

“When law enforcement responded to the scene, a K-9 track was called out and they initiated a K-9 track. Now, that track, they were actually able to pick up a scent, which led them directly to Christ Lutheran Church, probably a block away, on Winyah Drive just near Ms. Webb’s home. Now, while the track ended there, as a result of that track, officers were led to an open door and a broken window. It looked as though there was a blood smear on the deadbolt where the entry had been made.” App. 207, ll. 7-16.

During the State’s case in chief they called their lead investigator as their final witness and he explained how the evidence fit together. Investigator Isenhoward testified that the dog track was “significant” because it was “what we believed was the path of flight for the suspect, and we would then follow that track.” App. 894, ll. 1-4. The evidence of the track was then mentioned several times in the State’s closing argument:

“You heard how deputies responded, how they went to the scene. The dog followed the track. You heard from Deputy Alexander. They went to the church. What’s significant at the church? When they go in, when they get to the church, the window is broken out.” App. 993, ll. 19-24.

“The trail stopped there as far as the dog following.” App. 994, ll. 11-12.

“Around 1:30 a.m., the K9 tracks to the Christ Lutheran Church, which was broken into. Guess whose blood is on the door handles where he came in and out after he broke the window?” App. 1002, ll. 12-15.

Given the importance of this evidence to the State’s case, Petitioner submits trial counsel should have filed a Motion in Limine to prevent any testimony regarding the K-9 track from coming before the jury without the necessary foundation, or at a minimum, should have objected to this testimony when a proper foundation was not presented. The K-9 track evidence was used against the Petitioner to enhance the State’s case but there was no testimony offered to ensure its reliability. This evidence was especially harmful in the Petitioner’s case where this information was used to tie together two otherwise unrelated crimes, evidence of which likely prejudiced the

jury into thinking that it was more likely than not that the Petitioner committed both crimes if he committed one. Petitioner submits the PCR court erred in finding counsel was not ineffective in this regard and that he did not suffer prejudice as a result of counsel's ineffectiveness.

2. Trial counsel was ineffective for failing to call an essential witness.

Petitioner asserted that trial counsel failed to present his sister as a defense witness during his jury trial. Generally speaking, the Applicant must produce the testimony of a favorable witness at the PCR hearing to show that, but for failure to call the witness, there is a probability that the result would have been different. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). The Applicant is required to produce the witness testimony that he alleges should have been presented at the trial to show that it is not merely speculative that the testimony would have aided his defense. *Id.*

At the evidentiary hearing, the Petitioner called his sister, Vernell Wallace, as a witness. App. 1229. She stated that Petitioner is her younger brother and they are close. App. 1229, ll. 2-5. During the time leading up to Petitioner's arrest he was living in an efficiency suite on her property. App. 1229.

Ms. Wallace testified that she was interviewed before the trial by Petitioner's private investigator, Lee Connelly. App. 1230, ll. 15-16. She did not recall ever speaking with Petitioner's trial counsel until the day of trial. App. 1230, ll. 11-13. She said that she was present in court during the jury trial everyday. App. 1230, ll. 2-4.

Petitioner testified in the evidentiary hearing regarding what she told Investigator Connelly and what she would have said if called as a witness in Petitioner's trial. She testified that she always remembered the events of January 30, 2009 because she picked up her Income Tax Returns that day. App. 1230 - 1231. She remembered that Petitioner took her to work that morning and at some point thereafter she got a call that her income taxes were ready to be picked up. App. 1230, ll. 11-21. She called Petitioner who picked her up at work sometime between approximately 12 p.m. and 1 p.m. and they went to pick up her check. *Id.* Then they went back to her house right before 3:00 p.m. App. 1232 - 1233. Vernell then went and ran errands with another family member and left Petitioner at home. *Id.* Later that day, around 5:30 or 6:00, Petitioner took her car and went to the store and ran an errand and got back to the house around 8:30 p.m. or 9:00 p.m. App. 1233 - 1234. Vernell testified that she woke up occasionally during the course of the night and saw that Petitioner was in the house but she could not testify as to what time that was. App. 1234. The next morning she saw Petitioner at 7:30 a.m. before she left the house. *Id.*

Vernell testified that she was in a car wreck shortly before this date and her fender was bent on her car. App. 1235, ll. 3-10. She recalled Petitioner coming in around this time and telling her that he cut his finger on her car. App. 1235, ll. 1-17. She didn't see it happen but she did see the blood and the cut on his hand. *Id.*

This testimony would have been important at trial. Carolyn Webb, the victim of the Armed Robbery, testified that she first saw her assailant when he came to her house that day asking for money around noon. App. 248-252. Vernell Wallace's testimony could have

provided an alibi for this portion of the allegations offered at trial. Ms. Webb then testified that she saw her assailant again that afternoon around 6:00 p.m. when he stopped by her house again. App. page 253. Petitioner submits Vernell Wallace's testimony provides an alibi for this time of day. While it did not provide an exact alibi as to the time that the crimes allegedly occurred, it did provide an alibi regarding earlier occasions when the victim was allegedly in contact with her assailant. This evidence would have brought into question Ms. Webb's identification of her assailant, which is extremely relevant as there was no physical evidence found at the scene of this crime. The only evidence tying the Petitioner to this particular crime was the identification by the victim.

Vernell Wallace also testified the Petitioner cut his hand on the fender of her car. She testified that, while she didn't see him cut his hand, she saw the cut on his hand immediately after while it was fresh and bleeding. She testified that this was the same cut on his hand that the lawyers talked about during the trial. She also testified that she did not observe him to be acting unusual at all during these occasions. This testimony would have been important at trial because Investigator Isenhoward testified that the Applicant had a cut on his right pinky finger that was "consistent with a knife attacker." App. 911 – 913. Petitioner submits since it was alleged that Carolyn Webb was attacked by a knife with her assailant¹, Isenhoward's testimony was intended to be circumstantial evidence of the Petitioner's guilt in Ms. Webb's crime. App. 258. Ms. Wallace's testimony could have directly contradicted that evidence offered by the State.

¹ There is no allegation that Linda Derrick, the victim of the Murder charge, was attacked by a knife.

PCR counsel asked Sutherland why he didn't call Vernell Wallace as a witness during the jury trial. App. 1202, l. 2. Sutherland testified that he was aware of what Ms. Wallace would testify about and did not believe it would be helpful. App. 1202, ll. 3-6.

Considering the testimony of Ms. Wallace and comparing that to the facts presented at trial, Petitioner submits the PCR Court erred in finding counsel was not ineffective for failing to call her as witness and that he did not suffer prejudice as a result of counsel's ineffectiveness. Petitioner further asserts the PCR court erred in finding Ms. Wallace's testimony to not be credible. Petitioner submits this testimony would have directly attacked the identification of the Petitioner by Ms. Webb. The testimony also would have directly contradicted the circumstantial evidence offered by the State regarding the injury on the Petitioner's hand. Both of these issues were significant issues to be considered by the jury in determining guilt or innocence, and there is a reasonable probability that had Vernell Wallace been offered as a witness in trial that a different conclusion would have been reached by the jury with regards to Ms. Webb's incident. Because these incidents were jointly tried together in one trial, it is impossible to guess the impact the evidence in one case had on the jury's deliberations regarding the other cases.

3. Appellate counsel was ineffective for failing to argue improper joinder during Petitioner's Appeal.

Generally, when offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced. State v. Cutro, 365 S.C. 366 (2005). Our Supreme Court has held that a trial court may try separate charges together "where they (1) arise out of a single

chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no [substantive] right of the defendant has been prejudiced.” State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002).

Joinder was thoroughly contested and objected to during pre-trial motions before the Petitioner’s jury trial. App. 29-56. After some deliberation the trial court denied the Petitioner’s motion for a severance. App. 67-68. The trial court held:

“Based on what has been represented to me in this case, I find that the matters that would be subject to this joint trial are related in kind, place, and character involving the closely connected transaction of offenses in that the defense has failed to show that the defendant’s right to a fair trial would be prejudiced by having a joint trial on all of these charges, these various indictments, that is. Although the matters that are closely related in kind, place, and character can be tried together, the court nevertheless should not join them in the same trial when the multiplication of the charges would confound the defendant’s – the defendant in his defense or prejudice him or cause the jury to be --- the attention of the jury to be distracted. I’ve considered all of the factors and find that the defense has failed to show any prejudice that would ensue from a joint trial, and I deny the motions for severance.” *Id.*

Evidence of prejudice or violation of a substantive right of the Defendant is a factor to be considered by the trial judge in making this determination but it is not the only factor. Before the even addressing the issue of prejudice, the court should make a specific finding that the “separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character.” Cutro. In this matter Petitioner submits the trial court did not make any specific factual findings on the record on these factors, but simply said it had “considered all of the factors and found that the defense has failed to show any prejudice.” App. page 68.

The test for joinder specifically states that the Court “has the discretion to order the indictments be tried together” if certain factors or met. Cutro. This seems to mean that the State

has the burden to present an argument to the Court's satisfaction in determining whether or not these factors are met and the indictments should be joined. The test for joinder does not say that separate indictments may be tried together at the election of the State UNLESS the Defendant proves prejudice. Petitioner submits that based upon the ruling stated by the trial court, it appears that an unnecessarily high burden was improperly placed on the Petitioner to prove prejudice without holding the State to their burden to prove that the incidents underlying the indictments were closely related in kind, place, and character. Accordingly, Petitioner submits that the trial court's analysis was improper. Petitioner submits there is a reasonable probability that these indictments would not have been joined together had the analysis for joinder properly placed the initial burden on the State.

During the pre-trial hearing the State presented argument that all three incidents occurred around 1:00 a.m. on January 31, 2009 (although they conceded that these events could have occurred within a nine hour period of time). App. 36 and 38. From the State's perspective the incidents were generally described as follows:

- Carolyn Webb was assaulted and stabbed with a knife in her home and the Defendant took money from her and left. *See*, trial transcript page 36. The victim identified the Defendant in a photo lineup and in court.
- Christ Lutheran Church had a broken window and open door. Blood was found inside the church and it was determined that a box of matches had been taken. *See*, trial transcript page 37. The blood was determined to match the Defendant.
- Linda Derrick was found beaten to death in her home and some jewelry and the victim's car had been taken. The Defendant's blood was found at the scene. *See*, trial transcript page 38. The matches from the church and the Defendant's DNA were found in the victim's car when it was recovered. *See*, trial transcript page 39. The victim's blood was also found on the Defendant's shoes when he was arrested. *Id.*

The first factor to consider in determining whether or not joinder is appropriate is to determine if the incidents arose out of the same chain of circumstances. In arguing this factor the State relied mostly upon their speculation of the timeline. Ms. Webb testified that the incident at her house occurred around 1:00 in the morning on January 31st. App. 254. During the investigation of that incident, a K-9 track² led law enforcement officers to a nearby church that appeared to have been broken into. Law Enforcement did not have any direct evidence as to when this break-in occurred. The only evidence submitted during trial regarding the time of the Burglary was a volunteer at the Church, Edna Wheeler, who testified that she had not seen the broken window the day prior when she was at the church, although she did not testify as to what time of day this was. App. 299. Regarding Ms. Derrick's incident, Petitioner submits there was no evidence offered as to when it occurred other than the fact that she was found by family members around 9:00 p.m. on January 31st. App. 285.

For the second factor, whether or not the cases were provable by the same evidence, the State focused on the fact that several witnesses were the same for all three incidents. However, Petitioner submits this was simply a result of the three incidents occurring around the same time in the same area of town so that the same deputies and investigators and CSI technicians were on duty. Petitioner further submits the actual evidence offered to prove the Ms. Webb incident was vastly different than the evidence offered to prove the other two. When Ms. Webb called 911, deputies were called to the scene but did not observe the incident. CSI processed the scene but did not find any physical evidence in the form of DNA, blood, fingerprints, or anything pointing

² As discussed in a section above, the credibility K-9 evidence track is questionable because a foundation was not properly laid for this evidence during trial.

to a particular suspect. The only evidence resulting from this incident that incriminated the Petitioner was the testimony and identification by Ms. Webb. Petitioner submits the only evidence that ties the incident with Ms. Webb to any other incident was the K-9 track to the Church. Petitioner further submits the evidence underlying Ms. Webb's case was not the same evidence used to prove the Burglary and Derrick case. As a result, Petitioner submits this case could have easily been tried separately without inconveniencing or prejudicing the State in any substantial way.

As to whether or not the indictments were for crimes of the same general nature, Petitioner submits they are not. The incident with Ms. Webb involved a home invasion where the victim suffered only minor to moderate injuries and had a small amount of cash taken. App. 260-261. The Burglary of the Church appears to have involved trespassing of an unoccupied building where a box of matches was taken. *See generally*, trial transcript. The incident involving Ms. Derrick presumably involved a home invasion resulting in the beating death of the victim and theft of her jewelry and car. *See generally*, trial transcript. While there may be some similarities between the Webb and Derrick incident (assault, robbery, home invasion), the types of injuries and the types of items taken were very different. In addition, the burglary of the Church is not the same general nature of the other two crimes.

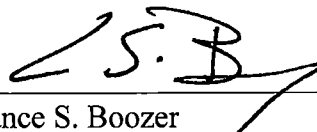
Finally, in determining whether or not joinder is appropriate, the trial court is supposed to look at whether or not a substantive right of the Defendant would be prejudiced by joinder of the cases. Although Petitioner is not able to articulate a substantive right such as a right to confrontation which is specifically violated by the joinder in this matter, the purpose of the test for joinder is to ensure that the Defendant receives a fair trial and that the jury's analysis of one

crime is not unfairly contaminated by the evidence of another unrelated crime. Accordingly, if the factors to justify joinder are not sufficiently established by the State, the Defendant is at risk of having his right to Due Process violated.

Petitioner submits the issue was properly raised and preserved by trial counsel at trial and should have been raised by appellate counsel on appeal. Petitioner further submits that the PCR court erred in finding appellate counsel was not ineffective for failing to raise this issue on Appeal and that Petitioner did not suffer any prejudice as a result of appellate counsel's ineffectiveness.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the PCR court's ruling and order a new trial in Petitioner's case. If this Court grants certiorari, Petitioner asks permission under the rules to brief the issue presented.

A handwritten signature in black ink, appearing to read 'L.S. Boozer', written over a horizontal line.

Lance S. Boozer
ATTORNEY FOR PETITIONER

This 1st day of June, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper Circuit Court Judge

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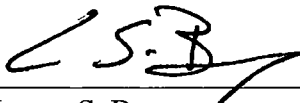
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000057

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above-referenced case has been served upon Clay Mitchell, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Elbert Wallace, #264322, at Lieber Correctional Institution, 136 Wilborn Ave., Ridgeville, SC 29472, this 1st day of June, 2017.



Lance S. Boozer

ATTORNEY FOR PETITIONER