STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

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S.C. SUPREME COURT

KRISTOPHER WILMONT BERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000100

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for not properly objecting to the admission, for impeachment, of three prior acts which led to Petitioner's other-than–honorable discharge from the United States Marine Corp when two of the three acts did not constitute convictions pursuant to Rule 609, SCRE, and the third act that did result in a conviction was over ten years old and the State failed to provide written notice?

STATEMENT

In September of 2010, the Darlington County Grand Jury indicted Petitioner Berry for criminal solicitation of a minor and lewd act, indictments #2010-GS-16-1364, 2011-GS-16-894. On July 18, 2011, Petitioner proceeded to jury trial before the Honorable J. Michael Baxley. Paul V. Cannarella represented Petitioner at trial. Kendall Burch, Patti McKenzie-Parker and John Holt prosecuted the case. The jury found Petitioner not guilty of lewd act but guilty of criminal solicitation. Judge Baxley sentenced Petitioner to ten (10) years suspended upon the service of five (5) years with five (5) years of probation. A timely notice of intent to appeal was filed and the direct appeal perfected. On October 30, 2015, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Berry, Op. No. 2013-UP-396 (S.C. Ct.App. filed October 30, 2013).

On December 19, 2013, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on November 19, 2014. On January 11, 2016, an evidentiary hearing was held before the Honorable Roger E. Henderson. Tristan M. Shaffer represented Petitioner at the PCR hearing. Jessica E. Kinard represented the State. In a written order signed on November 10, 2016, Judge Henderson denied relief and dismissed the application. A timely notice of intent to appeal was served on January 17, 2017. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for not properly objecting to the admission, for impeachment, of three prior acts which led to Petitioner's other-than-honorable discharge from the United States Marine Corp. when two of the three acts did not constitute convictions pursuant to rule 609, SCRE, and the third act that resulted in a conviction was over ten years old and the State failed to provide written notice.

Prior to Petitioner's testimony at trial a hearing was held to determine whether the acts surrounding Petitioner's "other than honorable discharge" from the Marine Corp. were admissible as impeachment evidence. (App. pp. 341 – 346). Trial counsel objected to reference to the following prior bad acts which resulted in discharge: (1) Petitioner used a military computer for personal use without permission; (2) Petitioner falsified documents; (3) Petitioner trespassed on private property. (App. p. 342, lines 1-18). In regard to the falsified documents, trial counsel told the judge, "Now, there was a separation in lieu of court-martial, which may be some type of pleas bargaining process. But that involved falsifying government documents." (App. p. 342, lines 10-12). In regard to the trespass, trial counsel told the judge, "So, I don't think – he wasn't charged with breaking and entering." (App. p. 342, lines 17-18). Later trial counsel told the judge, "I don't think that the local Sheriff's Office charged [Petitioner] with anything." (App. p. 345, lines. 1-2).

The State argued:

> These [are] military convictions really, are what they are. It took place before a tribunal, where I am sure he had an attorney, a JAG attorney. He did this. He was convicted of this. He was found guilty of less than honorable things. I think - - - How can it not go to the truth and veracity of what he was saying. It fit regularly under Rule - - Just like a regular conviction.

(App. p. 343, lines. 9-17). The trial judge asked, "I am asking you under Rule 609 [SCRE], upon what do you base that entitlement?" The State replied:

> I was looking at Rule 608 [SCRE]. If you want to talk strictly about

> [Rule] 609 [SCRE], I think it fits within the time limit. I think just generally it fits the exact rule. Subject to Rule 403[, SCRE], I don't see a problem with that. Rule 609(a)(2)[, SCRE], [states] that if [a defendant] be convicted of a crime, shall be admitted if it involves dishonesty or false statement regardless of the punishment.

(App. p. 344, lines. 9-15). In regard to the military records, the State admitted that, "I'm not an expert at reading these documents." (App. p. 345, lines. 9-11).

The trial court held, "Rule 609 [SCRE] says that the witness has been convicted of a crime shall be admitted if it involves dishonesty, or false statement regardless of the punishment. I find that each of these specifications involve dishonesty and will therefore permit them in." (App. p. 345, lines. 14 –19). Based on the judge's ruling, trial counsel asked Petitioner, during direct examination and in front of the jury, about the improper use of the computer, the falsified documents and the trespassing. (App. pp. 383-386).

On direct appeal Petitioner challenged the trial judge's finding that the acts which led to his other-than-honorable discharge from the Marine Corp were admissible to impeach pursuant to Rule 609(a)(2), SCRE. Petitioner argued that the actions were not prosecuted criminally, Petitioner's military discharge constituted an administrative separation and not a conviction under Rule 609 and the trial court failed to conduct any Rule 404(b), SCRE, analysis. The South Carolina Court of Appeals found the issue unpreserved and wrote:

> Although defense counsel requested a hearing to determine the offenses that could be used to impeach Appellant, the only issue defense counsel raised during the hearing was whether or not the offenses were crimes of dishonesty. Defense counsel never raised any argument to the trial court regarding whether or not the military offenses constituted "convictions" under Rule 609(a)(2) and never asked the trial court to make any rulings pursuant to Rule 404(b). Defense counsel also did not object when the State indicated that the offenses were "military convictions." Additionally, defense counsel did not object when the trial judge admitted the impeachment evidence under Rule 609(a)(2). Accordingly, we find Appellant's arguments regarding Rule 404(b) and whether Appellant's prior bad acts constituted convictions under rule 609(a)(2) are not preserved for our review.

State v. Berry, Op. No. 2013-UP-396 (S.C. Ct.App. filed October 30, 2013).

During the PCR hearing Petitioner admitted that the act involving the computer resulted in a conviction. (App. p. 587, lines 14-22; p. 598, line 18 – p. 599, lines 1-3). Petitioner testified, "Whenever I was in – I was a close combat instruction I think it was 1994-95[1], I had wrongfully appropriated a computer for use in my close combat school. So what I did was I pled to that. I took that medicine because that's what I did. I got that conviction but it was, being that it was more than ten years old, the state should have been obligated to let us know they were going to use that and to my, they did not. I don't have any written information about that at all, anywhere, as what I remember as my Rule 5." (App. p. 587, lines 14-22). Petitioner additionally testified that the administrative discharge was not a conviction and trial counsel should have objected to the use at trial for impeachment (App. p. 586, lines 11 – p. 587, lines 1-10). Trial counsel testified that he did not remember if the computer misappropriation was disclosed prior to trial. (App. p. 628, lines 1-13).

In the order of dismissal the PCR judge wrote:

> Counsel refuted all allegations that Applicant made in his application as well as during testimony including but not limited to, issues regarding Applicant's cell phone and test messages; their differing views of strategy; the fact that, though counsel is hired by Applicant and should respect his wishes, counsel should be trusted to try the case to the best of his or her ability; that trying a case costs money and more money means more resources at hand; issues regarding sentencing; issues regarding prior charges; and discovery matters. This Court finds that, through the presentation of evidence at the post-conviction relief hearing, Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions. Therefore, this allegation is denied and dismissed with prejudice.

(App. p. 650). The PCR judge erred. Trial counsel was ineffective for not objecting to the

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[1] At trial the judge asked the State how old the "convictions" were and the State answered, "In 2004 is when some of them were, and some of them were in 2005. It looks like charges were received 11 January, 2005." (App. p. 343, lines 18-21). Petitioner's military records were marked as Court's exhibit #2 at trial but were not admitted at the PCR hearing.

admission of the three prior acts. While the falsification of documents and trespass appear to have resulted in Petitioner's other than honorable discharge, it does not appear that either of those prior acts resulted in conviction as required by Rule 609, SCRE. The computer misuse that resulted in a conviction was over ten years old and the State failed to provide written notice as required by Rule 609(b), SCRE.

Rule 609 is titled "Impeachment by Evidence of **Conviction** of Crime" (emphasis added) and provides:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness,
>
> **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> **(2)** evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).
>
> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Trial counsel should have objected to the falsification of documents and trespass on the ground that these two acts did not result in convictions, as required by Rule 609. Trial counsel

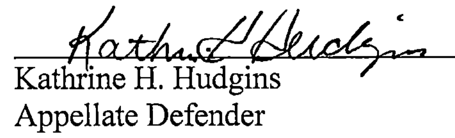
should have objected to the conviction for computer misuse because the State failed to provide advance written notice as required by Rule 609(b).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Counsel was ineffective in failing to object to the admission of the three prior acts on the grounds that two of the prior acts did not result in conviction and the third act, which resulted in a conviction, was over ten years old and the State failed to provide written notice. There is a reasonable probability that, but for trial counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Credibility was a key factor for the jury to determine. The jury acquitted Petitioner of lewd act. There is a reasonable probability that the erroneous admission of the prior bad acts effected the jury's determination of credibility and effected the outcome of the proceeding.

CONCLUSION

Based on the above argument this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2017.

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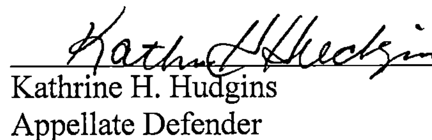
CERTIFICATE OF SERVICE

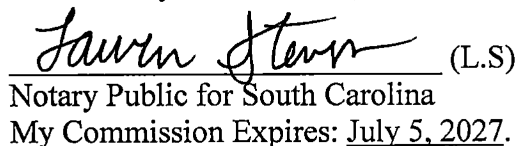
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kristopher Wilmont Berry, at 1900 Patrick Hwy, Hartsville, SC 29550, this 17th day of November, 2017.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 17th day of November, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.