

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

RECEIVED

JAN 26 2018

S.C. SUPREME COURT

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000057

BRIEF OF APPELLANT PURSUANT
TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that appellant, who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this was prejudicial information that likely led the jury to hand down their guilty findings based on an improper basis.

STATEMENT OF THE CASE

Petitioner Demetrius Simmons was tried in his absence and convicted of petit larceny, resisting arrest, breaking and entering into a motor vehicle and two counts of first degree burglary per a jury trial held during the December 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Attorneys Joseph Maxwell and Sarah Henry represented petitioner at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state. Judge Pyle's sealed sentence was published by him (Judge Pyle) on October 16, 2014, at the sentencing hearing held in the case. Petitioner, Joseph Maxwell, Esquire, and Assistant Solicitor Jennifer Tessitore were present at the sentencing hearing. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. App. 198-202. Petitioner did not enjoy the benefit of a direct appeal in the case.

On September 17, 2015, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. The respondent filed a return dated July 7, 2016, requesting that a hearing be held in response to petitioner's PCR action. App. 215-220.

A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App, 222-253.

On December 20, 2016, Judge Hayes signed an Order of Dismissal denying PCR relief to petitioner. App. 255-261.

Petitioner appealed Judge Hayes' Order and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order for a brief to be filed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) in the appeal. This brief follows.

ARGUMENT

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that appellant, who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this prejudicial information that likely led the jury to hand down their guilty findings based on an improper basis.

Petitioner was tried in absentia on two burglaries charges and other related charges emanating from a break-in that occurred at the Tintinger residence. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through (“trashed”) and that after she saw that the console and glove compartment had been opened up and that her garage door opener was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. App. 38, l. 9 – p. 69, l. 11.

Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27, l. 24 – Tr. 28, l. 18) as follows:

- 1.) The portion where the 911 dispatcher that said “the same guy’s back” presumably when Mr. Tintinger called to report the second break in; and
- 2.) The portion where the 911 call includes a statement about a “streak of break-ins” apparently in the area.

However, when the 911 tape was played and there was a statement made on the 911 tape to the effect where statement was made (allegedly by Mr. Tintinger) that the “same guy came back,” the defense objected, but the trial judge overruled the objection. Tr. 95, l. 11 – p. 98, l. 3.

Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle¹ exceptions, nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, there is a heightened prejudice in admitting a prior crime that is strikingly similar to the one for which the accused on trial because it suggests that appellant had the propensity to commit the similar crime charged. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

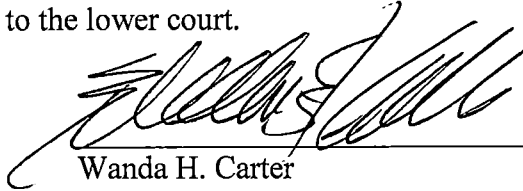
¹ Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury's verdict influenced by the challenged evidence. State v. Martucci, supra.

In the case at bar, the prior bad evidence made it seem as though appellant, who was arrested based on the description given from the second Tintinger break-in, was guilty of the first break in as well in addition to other burglaries in the neighborhood. As a result, appellant was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play, again, because the jury was presented with the assumption that appellant was guilty of the first Tintinger burglary based on the prior bad acts evidence that he was guilty as charged on the second Tintinger burglary and all of the other offenses charged against him combined. Although Mr. Tintinger witnessed a perpetrator (not identified as appellant at that time) committing the second burglary, there were no eyewitnesses to the first Tintinger burglary, but nonetheless, the prior bad acts evidence on the second burglary was used to link appellant to the first burglary. This error violated appellant's right to a fair trial via the Fourteenth Amendment because there was no probative value in the prior crime evidence, and even if probative value existed (arguably), the prejudicial value outweighed any probative value, especially since it was highly likely that the prior bad crime evidence contributed to the jury's guilty verdicts so the admission error cannot be considered harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

Based on the foregoing argument, counsel for appellant requests that his convictions and sentences be reversed and his case remanded to the lower court.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

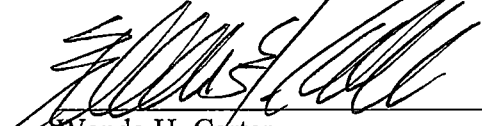
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant have been served on Demetrius Simmons, ##283195, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of January, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.