

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

ISAAC GLENARD LYLES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001769

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in finding that failing to impeach the State's key witness with a burglary and armed robbery conviction because trial counsel did not understand Rule 609; SCRE, did not violate petitioner's Sixth Amendment right to effective assistance of counsel?

STATEMENT

On September 27, 2013, a Spartanburg County grand jury indicted petitioner for possession with intent to distribute marijuana; trafficking in cocaine in an amount more than ten grams; trafficking in cocaine base in an amount more than ten grams; possession of a firearm during the commission of a violent crime; possession with intent to distribute cocaine within proximity of a school; and possession with intent to distribute crack cocaine within proximity of a school. App. 475-487. On December 4, 2013, petitioner was tried before the Honorable Roger L. Couch and a jury. App. 1. Scott Daniel Spivey represented the State and William S. Bean, IV, represented petitioner. App. 1. The jury convicted petitioner and Judge Couch sentenced him to an aggregate sentence of life imprisonment without the possibility of parole. App. 297, l. 14 – 298, l. 8. App. 303, l. 18 – 304, l. 13. Petitioner's convictions were affirmed on appeal. App. 450-52.

On April 18, 2015, petitioner filed a PCR application. App. 306. On June 28, 2017, the Honorable Robin B. Stilwell held a hearing on petitioner's application. App. 345. Susannah Ross represented petitioner and Valerie G. Giovanoli represented the State. App. 345. On August 7, 2017, Judge Stilwell denied relief and this petition for certiorari follows. App. 454.

ARGUMENT

The PCR court erred in finding that failing to impeach the State's key witness with a burglary and armed robbery conviction because trial counsel did not understand Rule 609, SCRE, did not violate petitioner's Sixth Amendment right to effective assistance of counsel.

Trial counsel made a mistake of law which prevented him from impeaching the State's only witness tying petitioner to the illegal drugs in this case with the witness's prior convictions for burglary and manslaughter. App. 392, ll. 16 – 23. He interpreted the time limit in Rule 609, SCRE, for impeaching on prior convictions as only applying to the date of conviction, not the “release of the witness from the confinement imposed for that conviction, whichever is the later date. . . .” App. 392, ll. 16 – 23. Rule 609(b), SCRE. On direct appeal, the Court of Appeals held that “whether the convictions were admissible under Rule 609(a)(1), SCRE, is not preserved.” App. 451. State v. Lyles, Op. No. 2016-UP-045 (S.C. Ct. App. Jan. 27, 2016).

The State's Case Depended Upon Edward Wesson's Testimony

The drugs that were the basis of the charges against petitioner were found by the police when they executed a search warrant at the apartment of Edward Wesson (“Wesson”). App. 82, l. 16 – 83, l. 8. App. 78, ll. 4 - 10. App. 102, l. 13 – 108, l. 25. The vast majority of the drugs were found in a black “tote bag” hanging on the fence behind Wesson's apartment. App. 102, l. 13 – 108, l. 25. The “tote bag” hung on the opposite side of the fence from Wesson's apartment. App. 102, l. 13 – 108, l. 25.

A SWAT team breached the front door of Wesson's duplex apartment and used a flash grenade. App. 78, ll. 4 - 10. App. 82, l. 16 – 83, l. 8. App. 90, ll. 14 – 22. After the SWAT team entered the front of the apartment, “subjects” fled from the apartment's side door. App. 82, l. 16 – 83, l. 8. The officer who was stationed at the right side of the residence could not

remember how many people were in the apartment when the SWAT team executed the search warrant. App. 83, ll. 16 – 21. He remembered Wesson, petitioner, and Harvey Rainey. App. 83, ll. 16 – 21. Another officer said “[m]aybe three” people were at the house. App. 111, ll. 16 – 17. The officer who filed the search warrant return could not remember finding anything in the apartment that belonged to petitioner. App. 112, ll. 6 – 11.

Wesson came out of the side door before petitioner. App. 83, l. 25 – 84, l. 3. The officer intentionally let Wesson run by him and then apprehended petitioner about “three steps” from the side door. App. 84, ll. 15 – 24. The officer found a handgun and a small amount of drugs on petitioner’s person. App. 84, l. 25 – 89, l. 1. The police found \$1,281.00 “located near the person of Mr. Lyles in the kudzu.” App. 99, ll. 6 - 18

The police stopped Wesson at the front of the house. App. 92, ll. 13 – 17. Wesson testified that he met petitioner on the day he moved into the apartment. App. 142, l. 22 – 143, l. 8. Petitioner reached an arrangement with Wesson that he would give Wesson crack in exchange for letting him sell drugs from Wesson’s apartment. App. 144, ll. 3 – 6. App. 148, ll. 7 – 18. Petitioner came to the house every day with the black bag that Wesson identified in court as belonging to petitioner. App. 144, l. 10 – 147, l. 23. Wesson said that petitioner wore a pair of goggles found in the backpack when petitioner rode his moped. App. 147, ll. 1 – 21.

Wesson knew that the backpack contained drugs because he actively participated in the sales. App. 148, l. 19 – 150, l. 6. Wesson said petitioner would “usually ask me to get [the backpack] for him, we, you know, did a sale.” App. 148, ll. 19 – 24. Wesson would retrieve the backpack from the fence and bring it to petitioner. App. 148, l. 25 – 150, l. 11. He had “no idea” why petitioner kept the backpack hanging on the fence. App. 150, ll. 3 – 6. The backpack

contained significant amounts of crack, powder cocaine, and marijuana. App. 217, l. 4 – 228, l. 8.

When Wesson first took the stand, the solicitor took the sting out of his impeachable offenses and asked if he had five fraudulent check convictions. App. 142, ll. 9 – 21. Wesson readily admitted the convictions. App. 142, ll. 9 – 21. Trial counsel asked no questions about Wesson’s fraudulent check convictions on cross-examination. App. 151, l. 13 - 164, l. 7.

Trial Counsel’s Failed Attempt to Impeach Wesson

Prior to Wesson testifying, the solicitor raised the issue of his impeachable offenses and handed up the case of State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013), aff’d in part rev’d in part State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). App. 121, l. 10 – 124, l. 6. App. 139, l. 17 – 140, l. 7. The trial judge referenced a prior discussion in chambers during which he asked the lawyers to provide him information on the details of Wesson’s prior armed robbery conviction and stated he had gotten no response. App. 122, ll. 4 – 11. The court then allowed the solicitor to proffer Wesson’s testimony on the issue of his prior convictions and their admissibility. App. 122, l. 12 – 123, l. 23.

The solicitor first established that Wesson was convicted of armed robbery in 1996. App. 128, ll. 4 – 6. Wesson explained that he robbed an elderly woman at gunpoint at a grocery store. App. 128, l. 10 – 129, l. 19. The solicitor then confirmed that Wesson was convicted of third-degree burglary in 2006. App. 129, ll. 23 – 25. Wesson claimed he was not trying to steal anything but was caught sleeping at a construction site. App. 129, l. 23 – 130, l. 17.

Trial counsel only cross-examined Wesson about the facts of both crimes. App. 131, l. 1 – 138, l. 5. He never asked Wesson about the length of the sentence he received for the 1996 armed robbery conviction. App. 131, l. 1 – 138, l. 5. He never asked Wesson about his sentence

for the 2006 burglary conviction. App. 131, l. 1 – 138, l. 5. Trial counsel only argued that Wesson’s convictions were crimes of dishonesty:

Your Honor, as to the armed robbery particularly, he he just said he went there to to rob somebody and he and he took advantage of doin’ that and I think, I think you can argue deceit or non-deceit or dishonesty or not but it just seems clear to me that this is a a crime that clearly involves dishonesty when you’re plannin’ to go up there to steal somethin’ and in this case to use a gun to to take it away from, uh, the person who’s lawfully entitled to have it, the lady who had the the money in her wallet. I think it’s clear that it is a crime of of, uh, that involves dishonesty and I think it oughta be included and, uh, that the jury oughta know about it because I think it clearly affects his credibility.

App. 139, ll. 4 – 16.

Relying on Broadnax, the trial judge ruled Wesson’s convictions were not crimes of dishonesty and excluded them. App. 139, l. 17 – 140, l. 7. Trial counsel thanked the judge and made no further argument. App. 140, ll. 8 – 15. On direct appeal, petitioner’s appellate counsel challenged the trial judge’s ruling under both Rule 609(a)(1) and 609(a)(2). App. 442-45. The Court of Appeals ruled:

Although Lyles argued the witness’s prior convictions were convictions of dishonesty under Rule 609(a)(2), SCRE, at trial, he did not argue Rule 609(a)(1), SCRE, permits the use of any crime punishable by death or imprisonment in excess of one year to attack a witness’s credibility, regardless of whether the crime involved dishonesty or false statement. **Thus, whether the convictions were admissible under Rule 609(a)(1), SCRE, is not preserved.**

App. 451. State v. Lyles, Op. No. 2016-UP-045 (S.C. Ct. App. Jan. 27, 2016) (emphasis added).

Trial Counsel Admitted His Mistake of Law at the PCR Hearing

Trial counsel did not understand the time limits of Rule 609(a)(1). App. 391, l. 17 – 393, l. 8. At the PCR hearing, he first admitted that Wesson’s 2006 burglary conviction was within ten years of the 2013 trial. App. 392, ll. 8 – 15. Then, when asked about Wesson’s armed robbery conviction ending within the ten year limit, trial counsel replied, “My understanding was

that it was the conviction rather than the sentence itself. **I may be mistaken about that but.**" App. 392, ll. 16 – 23 (emphasis added). He then admitted that a 1996 armed robbery conviction, which carries a ten-year mandatory minimum sentence, would have brought the date to approximately 2005. App. 392, l. 16 – 393, l. 8.

At the end of the PCR hearing, PCR counsel argued that trial counsel did not understand the impeachment rules and that Wesson was the State's "star witness." App. 402, l. 17 – 403, l. 13. The Attorney General conceded that PCR counsel's interpretation of Rule 609 was correct, but argued that trial counsel "testified that he didn't know when [Wesson] was released from prison," which is also tantamount to an admission that trial counsel failed to fully investigate his case. App. 406, l. 19 – 407, l. 5. The State then used trial counsel's failure to investigate to argue that petitioner had not proved that fact at the PCR hearing. App. 406, l. 19 – 407, l. 5. The Attorney later conceded that the case "did boil down to the credibility of Mr. Wesson, the State's star witness." App. 408, ll. 3 – 8.

Judge Stilwell decided to take the case under advisement. App. 409, ll. 16 – 21. PCR counsel asked to supplement the record with evidence of Wesson's prior convictions. App. 409, l. 23 – 410, l. 1. Judge Stilwell said she was "welcome to supplement the record if you'd like." App. 410, ll. 2 – 3. Subsequently, PCR counsel handed up to Judge Stilwell a copy of Wesson's rap sheet.¹ Supp. App. 1. The rap sheet shows that Wesson was convicted of armed robbery on May 9, 1996, and he received a sentence of sixteen years' imprisonment suspended to fifteen years' imprisonment and five years' probation. Supp. App. 2.

¹ Wesson's rap sheet was not filed nor made an exhibit at the hearing, but counsel for the State has agreed that PCR counsel's submission was before Judge Stilwell and is properly part of the Appendix for this Court's review.

The PCR Court's Ruling

The PCR court agreed with petitioner and the Court of Appeals that trial counsel failed to make the proper argument for impeachment under Rule 609(a)(1) and, without expressly stating it, held that counsel performed deficiently. App. 468-69. The court wrote, "However, Counsel did not argue for their admissibility under Rule 609(a)(1)." App. 469. "There may have been additional crimes which could have been introduced to impeach the credibility of the witness." App. 469. These findings are equivalent to a holding of deficient performance.

Despite the State's concession at the hearing that the case boiled down to Wesson's credibility, the PCR court held petitioner was not prejudiced. App. 468-69. The court found that because the jury heard about Wesson's fraudulent check convictions, he had already been impeached with crimes of dishonesty. App. 468-69. The court held that because crimes of dishonesty "were introduced into the record," no prejudice resulted.

Discussion

Trial counsel performed deficiently because he failed to understand Rule 609 and make the proper argument at trial. The PCR court erred in holding that trial counsel's failure to impeach the State's "star witness" with serious crimes did not constitute prejudice under the Sixth Amendment. U.S. Const. amend. VI. Strickland v. Washington, 466 U.S. 668 (1984). The State's argument at trial was that Wesson was only a drug user and petitioner was a dangerous drug dealer. Had the jury heard that Wesson had convictions for the serious crimes of armed robbery and burglary, not only would it have affected his credibility but also caused doubt about who really owned the backpack containing the drugs.

The drug case of Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) shows the importance of impeachment for credibility with prior convictions. In Green, the police claimed

the defendant, who was standing with a group of men, sold an undercover agent crack cocaine. Green at 430-31, 527 S.E.2d at 99-100. The defendant testified that another man in the group sold the drugs. Id. During the defendant's testimony, the State impeached him with prior cocaine convictions under Rule 609(a)(1), SCRE. Id. The defendant's attorney failed to object that the prejudicial value of the convictions outweighed the prejudicial effect. Id.

The Supreme Court upheld the trial court's grant of post-conviction relief. Id. at 431-34, 527 S.E.2d at 100-01. As part of its analysis, the Court used the five factors from State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Id. Focusing on the credibility factor, the Green Court determined the defendant proved Strickland prejudice. Id. The Court held the defendant's "credibility was critical, as the jury had to choose between his version of events and that of the SLED agents." Id.

Just as in Green, credibility is central to petitioner's case. See also State v. Bryant, 369 S.C. 511, 518-19, 633 S.E.2d 152, 156 (2006) (holding erroneous admission of prior convictions for impeachment under Rule 609(a)(1) was not harmless because of centrality of defendant's credibility to the trial). It is undisputed that Wesson's credibility as the State's "star witness" was the most important issue in the trial. If the jury did not believe Wesson, the State could not tie the drugs in the backpack to petitioner. The jury only heard that Wesson had convictions for fraudulent checks. They did not hear that Wesson was a career criminal with violent offenses. Wesson's prior record also created a substantial incentive to please the State because any subsequent conviction would likely result in a stiff sentence.

The testimony of the State's drug expert, Investigator Jeff Kirby ("Kirby"), demonstrates the importance of impeaching Wesson and that the jury's knowledge that Wesson had a history of violent crimes would have made a difference in this case. The trial judge qualified

Investigator Kirby as an expert in street value of drugs, habits of drug users and drug dealers, and avoidance methods by people involved in the drug trade. App. 183, ll. 10 – 20. Kirby then testified that you can tell the difference between a drug user and a drug dealer because users will have paraphernalia for ingesting the drug and typically dealers will not. App. 171, l. 7 – 172, l. 10. Kirby testified that petitioner had no paraphernalia, such as a lighter, crack pipe, or brillo pad for ingesting drugs. App. 189, l. 12 – 190, l. 8. The State emphasized this difference during its closing argument, telling the jury that Wesson was merely a user and petitioner was the dealer. App. 244, l. 8 – 245, l. 4.

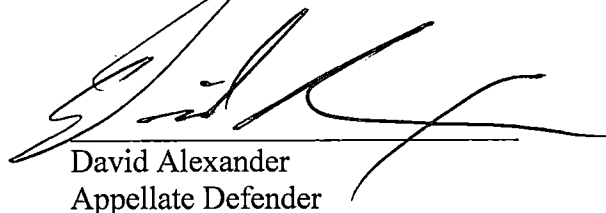
At least two other people were in the house besides petitioner—Wesson and Harvey Rainey. App. 83, ll. 16 – 21. The police recovered no narcotics from inside the residence—meaning no drugs for the personal use of Wesson and Rainey were found. App. 111, l. 16 – 112, l. 5. The police found no paraphernalia on Wesson or Rainey. App. 244, ll. 8 – 14. Under Kirby’s theory of the difference between a user and a dealer, the lack of paraphernalia on Wesson and Rainey calls into question that they were merely drug users. Had the jury heard about Wesson’s violent past, it would have impeached his credibility well beyond the fraudulent check convictions.

The Strickland prejudice flowing from the failure to impeach Wesson with the burglary and armed robbery conviction affects the crucial issue of the case—Wesson’s credibility and whether petitioner was the drug dealer—and therefore this specific deficiency of counsel causes prejudice central to petitioner’s conviction. See Smalls v. State, ___ S.C. ___, 810 S.E.2d 836, 844-845 (2018). “As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.” Id. at 846. The Smalls Court found prejudice, in part, because of trial counsel’s failure to impeach a witness central to the State’s case. Id. at 846-

47. Petitioner met his burden of proving prejudice because it is undisputed that the State's case rested on Wesson's testimony. Hearing about convictions for fraudulent checks cannot equate to convictions for armed robbery and burglary. This Court should grant certiorari, reverse petitioner's convictions, and remand for a new trial so that a jury can fully evaluate the testimony of Edward Wesson.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and remanding for a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and extends to the right of the line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

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ISAAC GLENARD LYLES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE
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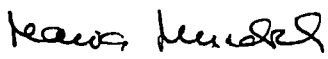
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Isaac Glenard Lyles, #209983, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of April, 2018.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2018.

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