

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

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Certiorari to Union County

RECEIVED

Honorable Paul M. Burch, Circuit Court Judge

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APR 10 2017

CLARENCE J. PUCKETT,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001775

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PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Trial counsel erred in failing to preserve for appellate review an error which occurred at trial when a police officer gave inadmissible prior bad act testimony regarding a prior drug sale involving petitioner when petitioner was already on trial for a drug charge because this prejudiced the defense and deprived petitioner of his right to a fair trial.

## STATEMENT

Petitioner Clarence Julius Puckett was convicted of trafficking in cocaine per jury trial held during the November 2012 term of the Union County General Sessions Court before Judge John C. Hayes, III. Petitioner was sentenced to imprisonment for a period of ten years. Erik Delaney represented petitioner at trial, and Assistant Solicitor John C. Anthony appeared on behalf of the state. App. 1 – 372. Petitioner’s case was affirmed on appeal by the South Carolina Court of Appeals. See State v. Puckett, Unpublished Opinion No. 2014-UP-347 (filed October 1, 2014). Supp. App. 45- 46. Carmen V. Ganjehsani, Esquire, represented petitioner on appeal. Supp. App. 1 – 24.

On March 23, 2015, petitioner filed a PCR application with the Union County Office of the Clerk of Court. App. 374 – 382. The respondent filed a return dated December 30, 2015, requesting that a hearing be held in response to petitioner’s PCR application. App. 383 – 387.

A PCR hearing was held in the case on January 20, 2016, at the Union County Courthouse before Judge Paul M. Burch. App. 389 - 430. Petitioner was present at the hearing and represented by Leah Moody, Esquire, and Assistant Attorney General Justin Hunter appeared on behalf of the state. On July 25, 2016, Judge Daniel D. Hall issued an Order of Dismissal in the case. App. 432- 441.

Petitioner appealed Judge Hall’s Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to preserve for appellate review an error which occurred at trial when a police officer gave inadmissible prior bad act testimony regarding a prior drug sale involving petitioner when petitioner was already on trial for a drug charge because this prejudiced the defense and deprived petitioner of his right to a fair trial.

In this case, four police officers<sup>1</sup> executed a search warrant at petitioner's residence on August 21, 2009, per information received that narcotics might possibly be found there. Cocaine was found during the officers' search of the residence.

At trial, Lieutenant Sherfield testified that they found Travis Anderson in petitioner's home when they first entered inside, and later discovered petitioner in a bathroom at the toilet where a plastic bag and white powder were found on the commode. App. 71, l. 13 – p. 94, l. 17.

Officer Johnson testified at trial and relayed the same events to the jury. Officer Johnson testified that a confidential informant had been to petitioner's home previously and witnessed petitioner selling drugs on a prior occasion, which lead to surveillance and the issuance of a search warrant in the case. Officer Johnson's testimony in question follows:

Q. [B]efore you get to the residence you received a call, say that it was information and you were going to use that information to go get a search warrant is that right?

A. Yes Lieutenant Sherfield gave me a call, advised me that one of our confidential informants...

Q. Right.

A. ...that we had used had been to Mr. Puckett's location...

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<sup>1</sup> Lieutenant Sherfield, Sergeant Johnson and Deputies Haney and Coffey participated in the search of petitioner's residence.

Q. Right.

A. ....and witnesses him sell...App. 158, lines 6-16.

Counsel moved for a mistrial with respect to Johnson's testimony outlined above later on during the trial. App. 208, l. 2 – p. 210, l. 4. The motion for a mistrial was denied. App. 210, l. 5 – p. 211, l.

On appeal, appellate counsel raised the following issue:

The trial court erred in refusing to grant a mistrial where the police officer testified about a confidential informant witnessing appellant selling drugs where such evidence constituted improper evidence of prior bad acts and where the trial court's only basis for denying appellant's motion for a mistrial was because the trial court did not want the case to be tried for a third time. Supp. App. 5.

The Court of Appeals issued an opinion affirming petitioner's conviction and further did not entertain the substantive merit of the prior bad acts question above because trial counsel failed to object contemporaneously to the error in order to preserve the issue for appellate review. See Supp. App. 45 – 46.

During the PCR hearing held in the case, petitioner testified that Anderson came to his house to sell him marijuana when the police arrived, entered, and found cocaine. App. 399, lines 2 – 23. Petitioner added that trial counsel in effect erred in failing to "timely call the mistrial" in order to preserve the prior bad acts/confidential informant testimony by Officer Johnson at trial. App. 340, l. 8 – p. 341, l. 2; App. 404, lines 3-24; App. 405, lines 2-25; p. 406, lines 16-22.

Trial counsel testified during the PCR hearing and admitted that he erred in failing to enter a contemporaneous objection when the testimony in question came about at trial. App. 417, l. 8 – p. 418, l. 18.

The PCR judge ruled that petitioner failed to meet his burden of proving that counsel was ineffective for failing to timely move for a mistrial because even if error occurred, petitioner

showed no prejudice and that this testimony contained was gratuitous information. App. 436 – 438.

Evidence of prior bad acts is inadmissible to show that the accused is a bad person or has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Also, even if prior crimes are considered under the Lyle<sup>2</sup> exceptions; nonetheless, the value of the priors must outweigh the prejudicial value, i.e., the prior crimes cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, the danger of prejudice is enhanced when the prior crimes or bad acts are similar to the crime for which the defendant is on trial. State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). There is heightened prejudice in admitting prior crimes that are similar to the one for which the accused is on trial. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2007); State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). Admitting priors similar to the crime for which the defendant is on trial would constitute evidence that is more prejudicial than probative because would suggest that the defendant had the propensity to commit the crime charged against him. State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992).

The prior bad act rules have particularly applicable in drug cases. Compare the Court's reversal in State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (2005), where the court found error where the prior bad act of the defendant's sale of crack cocaine to an undercover operative on several prior occasions in the past was not relevant to the charge of trafficking for which the defendant was on trial. See also the reversal in State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994),

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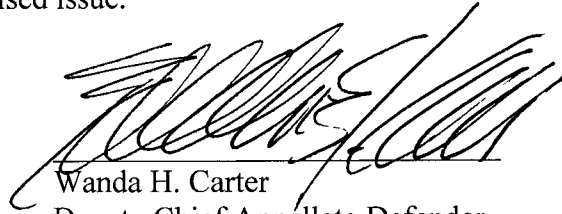
<sup>2</sup> Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

where the court held that the state's introduction of evidence of the defendant's prior cocaine sales was an attempt to demonstrate that because he had done so in the past, then he was guilty on the charge of distribution of crack cocaine for which he was being tried. In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (1996), the Court reversed and held that testimony concerning a prior sale of crack cocaine to a certain person by the defendant on January 14, 1994, was not necessary to establish the defendant's guilt regarding the January 18, 1994 sale of crack cocaine that was made to the same person. In State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (1992), the court reversed and held that since the defendant was being tried for distribution of crack cocaine, evidence that the defendant made prior drug sales from the same location was held to have been more prejudicial than probative. In State v. Garner, 304 S.C. 220, 403 S.E.2d 63 (1991), the Court held that the defendant, who was convicted of trafficking in cocaine, was prejudiced by the admission of portions of a taped conversation between him and another regarding negotiations for a future sale of a kilo of cocaine.

Since trial counsel's motion objecting to Officer Johnson's inadmissible prior bad act testimony was untimely, this precluded appellate review of this error as it occurred at trial. A contemporaneous objection must occur in order to preserve an issue for appeal. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Counsel's error in this regard constituted deficient representation at trial in violation of the Sixth Amendment. See Strickland v. Washington, U.S. 466 (1984). Also, but for the error, a reasonable probability exists that the outcome of petitioner's trial would have been different or the outcome of the appeal might have been different.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of April, 2017.

STATE OF SOUTH CAROLINA

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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 and Supplemental Appendix in the above referenced case has been served upon Justin J. Hunter, 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 and Supplemental Appendix have been served on Clarence J. Puckett, #353209, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 10th day of April, 2017.

  
Wanda H. Carter

Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 10th day of April, 2017.

  
(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.