

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JUN 01 2018

DEVOUN BENNETT,

PETITIONER
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000409

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to object to prejudicial comments made by the solicitor during the guilty plea about an unrelated homicide of a five-year old child killed in a similar home invasion in the area three days after the crime petitioner was charged with?

STATEMENT

On April 24, 2013, petitioner appeared before the Honorable Roger M. Young, Sr. in Charleston County and pled guilty to armed robbery and burglary in the second degree. He was sentenced to twenty (20) years for armed robbery and to fifteen (15) years for burglary in the second degree. Leslie T. Sanji, Esq. was plea counsel, Douglas B. Durant, Esq. was the assistant solicitor. (App. p. 1- p. 18).

Petitioner filed an application for post-conviction relief on February 23, 2015. (App. p. 19-p. 25). Respondent filed a return dated July 28, 2015. (App. p. 26-p. 30). An Evidentiary hearing was held on December 7, 2017, before the Honorable Michael Nettles. Petitioner was present and was represented by James Falk, Esq. Respondent was represented by Megan Jameson, Assistant Attorney General. Plea counsel, petitioner and the assistant solicitor testified at the hearing. (App. p. 31-p. 87). On January 16, 2018, Judge Nettles signed an order denying and dismissing the application for post-conviction relief. (App. p. 88-p. 97).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to object to prejudicial comments made by the solicitor during the guilty plea about an unrelated homicide of a five-year-old child killed in a similar home invasion in the same area three days after the crime petitioner was charged with.

During petitioner's guilty plea the solicitor gave the following information:

Mr. Durant: Your honor, on October the 25th of 2011 the victim in this case came forward and indicated that three days previous, on October 22nd of 2011, he had been robbed at his residence, an apartment on [redacted] in the apartment complex at [redacted] in Charleston County, west of the Ashley, by five black males, in a home invasion type of robbery; four of the perpetrators had handguns, and one of them had a shotgun.

The victim stated that there was a knock at the door and when he answered the Defendants forced their way into his residence and robbed him of his cash and some electronic equipment.

He indicated he did not report it at first because he was scared to come forward, but when he learned of the five-year-old girl, Allison Griffor, being killed on the 25th he came forward because it was very similar, in terms of a shotgun was used to kill the little girl, and he was concerned that these folks may have been the same ones.

The Court: I don't really know anything about the one you just mentioned. Is that ---

Mr. Durant: Allison Griffor was – there was a little girl that was – there was a home invasion in West Ashley and she was – they shot through the door and it killed the little five-year-old girl. The case has never been solved.

There's a – we don't think – and I'll tell you right now, we don't believe Mr. Bennett has any knowledge of that, but we believe that the people that he was with were probably the perpetrators of that home invasion too ---

The Court: All Right.

Mr. Durant: ---Particularly Phillip Moses. Phillip Moses was the one that, you know, that was indicated had the shotgun in this case, but it also turned out that Phillip Moses was stopped in a car like ten minutes away from where this little girl had been shot three days after that, and so we believe that – that Mr. Moses was involved in the Griffer case.

(App. p. 8, line 11- p. 9, line 21)

At no time did plea counsel object to the irrelevant and prejudicial part of the plea about another home invasion and the murder of a five-year-old girl. She did testify at the evidentiary hearing that she always felt she should have objected to those comments made by the solicitor. (App. p. 41, lines 7-17).

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), the Court

In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280, S.C. 325, 313 S.E.2d 298(1984); State v. Swords, 279 S.C. 554, 309, S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person.

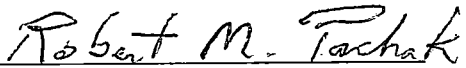
In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to

demonstrate the accused is a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. *See, United States v. Johnson*, 610 F.2d 194 (4th Cir. 1979); *State v. Byers*, 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *See, State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element i.e., intent or motive, of the crime charged. *See e.g., State v. Lyle, supra; State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); and *State v. Huggins*, 285 S.C. 361, 329 S.E.2d 759 (1985). 293 S.C. at 324-325, 360 S.E.2d at 319.

CONCLUSION

Because the prior bad act evidence was irrelevant and prejudicial petitioner's guilty plea should be reversed.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of June, 2018.

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IN THE SUPREME COURT

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DEVOUN BENNETT,

PETITIONER

V.

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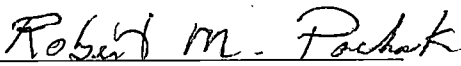
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Devoun Bennett states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's trial before Judge Michael G. Nettles, which was held on December 7, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Devoun Bennett.

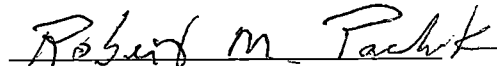
Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


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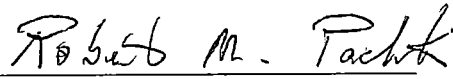
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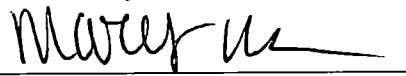
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Devoun Bennett, #355219, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of June, 2018.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of June, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.