

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

DAVID W. DOVER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001969

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in failing to find trial counsel ineffective for not objecting to testimony that Petitioner's ten-print fingerprint card came from the York County Detention Center and contained a mugshot because the references were not necessary to authenticate the fingerprint card and improperly indicated that Petitioner had a prior criminal record?

STATEMENT

In May of 2014, the York County Grand Jury indicted Petitioner, David Dover, for burglary second degree and petit larceny, indictments 2014-GS-46-1522, 1523. On November 10, 2014, Petitioner proceeded to jury trial before the Honorable Lee S. Alford. Mindy Lipinski represented Petitioner at trial. Jennifer Desch and Chris Jones prosecuted the case. The jury found petitioner not guilty of petit larceny but guilty of burglary second degree. Judge Alford sentenced petitioner to eight years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. On June 22, 2016, the South Carolina Court of Appeals affirmed the conviction. State v. Dover, Op. No. 2016-UP-319 (S.C. Ct.App. filed June 22, 2016).

On March 6, 2017, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on June 8, 2017. On August 2, 2017, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. Leah Moody represented Petitioner at the PCR hearing. Justin Hunter represented the State. In a written order signed September 12, 2017, Judge McIntosh denied relief and dismissed the application. A timely notice of intent to appeal was served on September 20, 2017. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in failing to find trial counsel ineffective for not objecting to testimony that Petitioner's ten-print fingerprint card came from the York County Detention Center and contained a mugshot because the references were not necessary to authenticate the fingerprint card and improperly implied that Petitioner had a prior criminal record.

At trial the State asked Brian Bagwell with the forensics services unit of the York County Sheriff's Office, "Where does that ten-print card come from?" (App. p. 275, line 22). Bagwell answered:

Ten-print cards are maintained in two areas. The York County Detention Center has a database that when you're arrested in York County, they take mug shots, photographs, everything and put it into a database system. We have access to that system, so we can print-out ink ten-print cards to compare with. SLED also maintains a database. SLED being the South Carolina Law Enforcement Division. They maintain a database of all South Carolina arrest records, not just York County. So if we have a State identification number from an individual, we can print a ten-print card if they're from Orangeburg - - -

(App. p. 275, line 23 – p. 276, lines 1-8). Trial counsel objected to the reference to the SLED database and the judge overruled the objection. (App. p. 276, lines 9-14). The officer was again asked where he obtained Petitioner's ten-print card and he answered, ". . . the York County Detention Center's database." (App. p. 276, lines 15-19). The officer then testified that the card contained a mugshot and a State identification number. (App. p. 276, lines 22-25). Trial counsel did not object to the reference to the York County Detention Center and did not object to the reference to the mugshot. Trial counsel only objected after the officer testified, "Your State ID number never changes. It's assigned to you for each arrest. Any time you get arrested, that same identification number id given to you." (App. p. 277, lines 7-12). The judge sustained the objection and the questioning moved to the comparison of Petitioner's fingerprint with that of a

fingerprint found on a television at the scene. Trial counsel was ineffective in failing to object to the testimony that Petitioner's ten-print fingerprint card came from the York County Detention Center and included a mugshot.

During the PCR hearing Petitioner testified generally that, "By her not objecting that stopped me from having the numerous appeals that I could have. If she would have objected when it would have got to the Court of Appeals in Columbia." (App. p. 451, lines 14-16). In the order of dismissal the PCR judge wrote:

Applicant testified that counsel was ineffective for failing to preserve her objections throughout the trial. Counsel testified that she made the proper motion for a directed verdict and although her motion was denied, it was not denied based on any preservation issues.

This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to preserve her objections. This Court finds that Applicant has failed to point out specifically which objections were not preserved and he has failed to show that Counsel was deficient in this regard. Furthermore, this Court finds that Applicant has failed to prove he was prejudiced by Counsel's actions as he has failed to show that the outcome of his trial or appeal would have been different had counsel preserved her objections. Applicant's appeal was not dismissed for preservation issues and there is no indication that a lack of preserving Counsel's objections harmed Applicant's case in any way. Applicant has failed to meet his burden of proving Counsel was ineffective and this allegation must be dismissed.

(App. p. 490). The PCR judge erred. The issue is not that trial counsel failed to preserve her objections. Instead, trial counsel was ineffective in failing to object to the testimony that the ten-print finger print card came from the York County Detention Center and contained a mugshot. By failing to make the objection, trial counsel failed to preserve the issue for appellate review. Petitioner was prejudiced by the deficient performance.

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.

Trial counsel was ineffective in failing to object to the testimony that the ten-print finger print card came from the York County Detention Center and contained a mugshot because these references imply that Petitioner had a prior criminal record. "In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person." Id. "Evidence of other crimes must be put to a rather severe test before admission." State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

In State v. Lawson, No. 2015-002467, 2018 WL 2708761, at *4 (S.C. Ct. App. June 6, 2018), the South Carolina Court of Appeals wrote:

In this case, the testimony referring to Kirkland and July 2003 on Appellant's ten-print card indicated to the jury that Appellant had a prior criminal record. We find Haftoglou's testimony that Appellant's ten-print card originated from Kirkland in July 2003 is most similar to the circumstances in Tate. See Tate, 288 S.C. at 106,


341 S.E.2d at 381 (finding a mug shot of the defendant containing a board that identified the law enforcement agency who took the photograph and the date of the photograph “clearly infer[red] to the jury that [the] appellant had a prior criminal record”).

In the present case the reference to the York County Detention Center, like the reference to Kirkland in Lawson, improperly implied that Petitioner had a prior criminal record. Additionally, the reference to the mugshot, like the mugshot in Tate¹, improperly implied that Petitioner had a prior criminal record. The references were not necessary to authenticate the fingerprint card. See State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009); Lawson (“Furthermore, the State could have accepted Appellant's offer to stipulate to the authenticity of the ten-print card. Thus, it was unnecessary for the State to reference Kirkland to authenticate Appellant's ten-print card.”) No. 2015-002467, 2018 WL 2708761, at *5. Petitioner was prejudiced by the improper references.

¹ State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986).

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 13th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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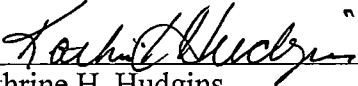
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David W. Dover states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. She has reviewed the record of petitioner's trial before Judge R. Lawton McIntosh, which was held on August 2, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. She 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 her as counsel for David W. Dover.

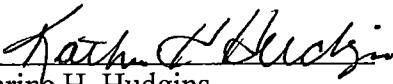
Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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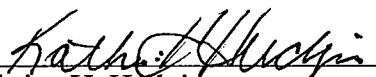
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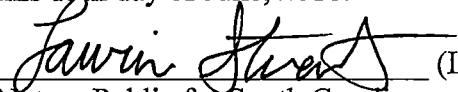
CERTIFICATE OF SERVICE

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 Harrigan 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 David W. Dover, #362139, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 13th day of June, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of June, 2018.



Notary Public for South Carolina (L.S)
My Commission Expires: July 5, 2027.