STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Sumter County

Honorable D. Craig Brown, Circuit Court Judge

ANTRELL RASHAWN FELDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001173

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

ISSUE PRESENTED

Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated when trial counsel agreed to the introduction of an unredacted summary of petitioner's oral statement to police which included the inadmissible information that petitioner was on bond for a lynching charge at the time of the alleged murder, which allowed the jury to infer that petitioner was a violent person in this close, wholly circumstantial case?

STATEMENT

On December 31, 2008, petitioner was indicted in Sumter County for murder and a weapons charge. App. 771. On November 14, 2011, petitioner was tried before the Honorable Howard P. King and a jury. App. 1. John P. Meadors and Chip Finney represented the State. App. 1. Shaun C. Kent and Ray Chandler represented petitioner. App. 1. The jury convicted petitioner. App. 564, ll. 5 – 17. Judge King sentenced petitioner to forty-two years' imprisonment for murder and a concurrent five years for the weapons charge. App. 580, ll. 11 – 16. Petitioner's convictions were affirmed on appeal. App. 649.

On July 23, 2014, petitioner filed a PCR application. App. 652. On March 28, 2017, a hearing was held before the Honorable D. Craig Brown. App. 677. Timothy L. Griffith represented petitioner and Julie A. Coleman represented the State. App. 677. On May 18, 2017, Judge Brown denied relief. App. 756. This petition follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. A PCR court's findings of fact will be upheld if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Questions of law are reviewed de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Petitioner's Sixth Amendment right to the effective assistance of counsel was violated when trial counsel agreed to the introduction of an unredacted summary of petitioner's oral statement to police which included the inadmissible information that petitioner was on bond for a lynching charge at the time of the alleged murder, which allowed the jury to infer that petitioner was a violent person in this close, wholly circumstantial case.

Introduction

With the assent of petitioner's trial counsel, a police witness told the jury that petitioner was on bond for lynching at the time of this murder. App. 345, l. 7 – 351, l. 20. At the PCR hearing, trial counsel admitted this was a mistake. App. 702, ll. 1 – 15. When the very experienced trial judge settled petitioner's record during the colloquy on petitioner's right to testify, Judge King said the pending lynching charge was not admissible. App. 469, l. 8 – 470, l. 12. Despite this testimony at the PCR hearing and Judge King's ruling during the trial, the PCR court ruled it was "unlikely that Applicant could have kept it out of evidence." App. 766. The PCR court also committed a legal error in holding that "Applicant understood and agreed with the decision to stipulate." App. 766.

Trial counsel's conduct—**not petitioner's**—is the focus of the Sixth Amendment guarantee of effective assistance. U.S. Const. amend. VI; United States v. Cronic, 466 U.S. 648, 654 (1984) ("Thus, 'the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.'"). The State's case against petitioner depended wholly on circumstantial evidence and the jury hearing petitioner was also accused of an unrelated violent crime was highly prejudicial in this murder trial.

Factual and Procedural Background

The State's case against petitioner was weak. In petitioner's direct appeal, his second issue alleged the trial court erred in not granting a directed verdict. App. 586.

Two people witnessed the murder and neither could identify petitioner as the shooter. App. 210, l. 3 – 211, l. 12. App. 237, l. 9 – 238, l. 9. App. 182, ll. 12 – 17. App. 184, ll. 7 – 8. One of the witnesses, Antrell McFadden, told the police he could identify the shooter when they interviewed him immediately after the event. App. 237, ll. 9 – 14. When he viewed a lineup, he recognized petitioner **but did not identify him as the shooter**. App. 237, l. 9 – 238, l. 9. He told the police he recognized petitioner and gave them his nickname. App. 261, ll. 17 – 25.

Antrell McFadden and his cousin, Kayla McFadden, were walking to a convenience store when a man they did not know asked them for a cigarette. App. 181, ll. 2 – 17. App. 209, ll. 1 – 22. They gave him a cigarette and continued walking towards the store. App. 181, ll. 5 – 23. App. 209, l. 17 – 210, l. 5. The McFaddens saw a white car with tinted windows stop near the man. App. 181, l. 18 – 183, l. 4. App. 210, l. 6 – 211, l. 4. The police later impounded a white car associated with petitioner and it did not have tinted windows. App. 311, ll. 6 – 18. The police said the car had glue residue on the windows. App. 269, l. 17 – 269, l. 19.

Kayla McFadden testified a man wearing a white shirt, dark pants, and a hat got out of the white car, shot the man, kicked him, and then fired more shots. App. 182, l. 12 – 184, l. 18. She was unsure of the color of the hat. App. 184, ll. 16 – 18. Antrell McFadden saw a man with a red hat, white shirt, and blue jeans get out of the white car and shoot the man. App. 210, l. 16 – 212, l. 20. On cross-examination, Antrell McFadden equivocated about whether the shooter wore a red hat or a hat was on the ground, but then said he was "sure" the shooter wore a red hat.

App. 233, ll. 3 – 20. Earlier in the evening, Antrell McFadden drank three cups of gin and three 24-ounce Bud Lights. App. 227, ll. 19 – 20.

The hat became the State's best evidence against petitioner. App. 506, l. 18 – 507, l. 23. The police found a red hat at the crime scene. App. 247, l. 13 – 248, l. 5. The State's fingerprint expert claimed a latent print found on a sticker on the hat belonged to petitioner. App. 399, l. 4 - 400, l. 24. The State's DNA expert found the DNA of two people on the hat—petitioner and an unknown person. App. 453, ll. 2 – 18.

The trial court held a pre-trial Jackson v. Denno, 378 U.S. 368 (1964), hearing to determine the admissibility of petitioner's statement to the police. App. 109, l. 20 – 110, l. 2. The State called Detective Jason Thomas Potteiger who testified that on July 19, 2008, he spoke with petitioner at the Sumter police station. App. 113, ll. 7 – 14. Detective Potteiger read petitioner his rights and petitioner signed a waiver. App. 113, l. 15 – 118, l. 20. The State entered Detective Potteiger's summary of petitioner's oral statement into evidence as a court's exhibit at the Denno hearing. App. 119, ll. 12 – 24.

Because of its admission at the Denno hearing, trial counsel was aware of the contents of Detective Potteiger's summary well before the State attempted to enter it into evidence during the trial. App. 119, ll. 12 – 24. Trial counsel did not ask any questions about the substance of Detective Potteiger's summary at the Denno hearing and did not ask for it to be redacted. App. 121, l. 25 – 125, l. 1. When asked by Judge King for argument at the conclusion of the Denno hearing, trial counsel stated, "I would not have any objection to it, the statement, if he chooses to go forward with it." Tr. 126, l. 9 – 127, l. 2.

When Detective Potteiger testified before the jury, the court held a bench conference before he discussed petitioner's statement. App. 345, ll. 4 – 18. Two exhibits were marked

during the bench conference: State's Exhibit 34 (Sumter police department interview form); and State's Exhibit 35 (Summary of defendant's oral statement). App. 345, ll. 11 – 18. Judge King asked, "All right, 34 and 35. And, Mr. Kent, you admit these without objection?" App. 345, ll. 19 – 20. Trial counsel replied, "Yes, sir, Judge." App. 345, l. 21.

After preliminary questions about whether petitioner's statement was voluntary, the solicitor asked Detective Potteiger whether State's Exhibit 35 was his typed summary of his oral conversation with petitioner. App. 349, l. 22 – 350, l. 2. The solicitor asked the court's permission to have Detective Potteiger publish the statement and Judge King replied, "All right. It's in evidence. It can be published." App. 350, ll. 3 – 8. Detective Potteiger then read State's Exhibit 35 to the jury. App. 350, l. 9 – 354, l. 1. When he began reading the substantive portion of the summary, Detective Potteiger read, "Antrell Felder began by stating he was 26 years old, that his date of birth was . . . and that he lived at . . . . **He related that he was currently on bond for a lynching charge.**" App. 351, ll. 9 – 12 (emphasis added). Trial counsel did not object. State's Exhibit 35, which contained the statement about the pending lynching charge, went back to the jury with the evidence. App. 558, ll. 2 – 15.

Near the end of the trial, as Judge King prepared to advise petitioner on his right to testify, he settled petitioner's record. App. 469, l. 5 – 470, l. 13. Trial counsel stated, "Judge, just for the record, just for clarity purposes, my understanding of Mr. Felder's prior criminal record that may or may not be useable against him would be a lynching" and a drug charge. App. 469, ll. 12 – 18. Judge King clarified, "So the 2 things are a lynching conviction and a---" App. 469, ll. 19 – 22. Trial counsel replied, "A lynching conviction, Judge—no, a pending lynching charge. I apologize." App. 469, ll. 23 – 24.

The solicitor agreed petitioner had not been convicted of lynching. App. 470, ll. 4 – 6. Judge King stated, "I don't think the lynching is admissible under 608, 609, let me see. 609. Prior convictions. And a pending charge would not be admissible. So the one charge that could be used against him would be the—not the lynching, but the other." App. 470, ll. 8 – 12. The solicitor did not attempt to argue the lynching conviction would be admissible. App. 469, l. 5 – 470, l. 12.

At the PCR hearing, both trial lawyers admitted their mistake in allowing the lynching charge before the jury. Petitioner asked trial counsel Kent whether he objected to the State entering the summary without redacting the lynching charge based on "prior acts" and prejudice. App. 26, ll. 1 – 15. Trial counsel replied. "I don't remember but I don't think I did. No, Tim. And if I didn't, based on your question, that would be a mistake." App. 702, ll. 13 – 15. Petitioner's other attorney, Chandler, heard Kent's testimony about the lynching charge and when he was asked whether it changed the outcome of the case, Chandler testified, "You could argue it in retrospect. **You could argue that hard in retrospect.** If I was sitting in a room looking at a transcript, I would argue it hard in retrospect." App. 735, ll. 21 – 24 (emphasis added). Chandler continued answering this question by discussing their theory of the case and the lack of evidence against petitioner and summarized, "Whether our client had a pending charge or not was not as important to me as was getting across to the jury that he couldn't have done it." App. 738, ll. 17 – 20.

DISCUSSION

Trial counsel Chandler's implication notwithstanding, asking the trial court to redact the pending lynching charge was not inconsistent with their overall strategy. No valid reason existed not to have the mention of the pending lynching charge redacted. As Judge King quickly

recognized, the pending lynching charge was inadmissible even if petitioner took the stand. A pending charge on an unrelated matter was not relevant to any fact in the case and was therefore inadmissible. See Rule 401, SCRE. Without any probative value, but loaded with unfair prejudice, the pending lynching charge was inadmissible. See Rule 403, SCRE. The pending lynching charge was an inadmissible prior bad act that fell under no exception in the rules of evidence. See Rule 404, SCRE. It was also inadmissible because it was not a conviction. Rule 609, SCRE. As trial counsel Kent admirably admitted, not objecting to its admission was an obvious mistake. Petitioner explained the inadmissibility of the lynching charge and prejudice during his testimony at the PCR hearing. App. 722, l. 15 – 726, l. 23.

The PCR court denied relief because petitioner "understood and agreed with the decision to stipulate" to the statement's admissibility and because the statement was voluntary, "it is unlikely that Applicant could have kept it out of evidence." App. 766. The PCR court also ruled that petitioner suffered no prejudice from the jury learning that he was on bond for another violent crime while they considered his guilt on a murder charge. App. 766-67.

The PCR court erred and this Court should grant petitioner a new trial. Clients rely on their lawyers to make proper evidentiary objections and the PCR court's finding that petitioner agreed with their legal decision is not the question. Trial counsel's conduct in failing to object to the obviously inadmissible lynching charge and not having it redacted constitutes deficient performance under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984).

Trial counsel's deficiency prejudiced petitioner because the jury could heard about another violent crime and could infer that petitioner was a violent person. Erroneous admission of other crimes frequently results in reversals of convictions where, like petitioner's case, guilt is not overwhelming.

The recent case of Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) provides an illustration of the prejudicial impact of deficient performance related to a defendant's prior bad act. In Smalls, the defendant was convicted of the armed robbery of a Bojangles' restaurant. Smalls at 180, 810 S.E.2d at 839. The police found the defendant's fingerprint on a shotgun recovered near the restaurant. Id. During the solicitor's questioning of a policeman, the State asked whether the defendant "burglarized" someone's house and stole the shotgun. Id. at 185-86, 810 S.E.2d at 841-42. Trial counsel did not object and this Court found deficient performance because of the solicitor's "improper effort to introduce evidence that Smalls committed another crime." Id. The Smalls Court cited to Rule 404(b) for the objection that trial counsel should have made.

Trial counsel's error in Smalls, among the other errors in the case, undermined confidence in the outcome of the trial to the extent that reversal was required. Id. at 195, 810 S.E.2d at 847. One of the factual similarities between the two cases demonstrates that petitioner's case should also be reversed. In Smalls, there were two witnesses to the robbery. Id. at 179-80, 810 S.E.2d at 838-39. One of the witnesses identified the defendant and the other was able to narrow his identification down to the defendant and one other person. Id. Petitioner's case also had two witnesses. Unlike in Smalls, neither witness could identify petitioner. Petitioner's DNA on the hat is also similar to the fingerprint on the gun in Smalls. Like Smalls, the specific prejudice to petitioner of the jury hearing about the lynching charge requires reversal because of the weakness of the State's case.

In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), a drug prosecution, the solicitor impeached the defendant with two prior drug charges and his attorney failed to object. Id. at 431, 527 S.E.2d at 99-100. The Court held that the prejudicial value of the prior convictions

outweighed their probative value, they were inadmissible, and trial counsel performed deficiently in failing to object to their use. Id. at 433-34, 527 S.E.2d at 101. The Court also held the defendant was prejudiced. Id. The Court noted that the prior convictions affected the defendant's credibility. Id.

Petitioner's case is more egregious than Green. In petitioner's case, the jury heard about a pending violent charge that was not even the subject of a conviction. The defendant in Green received a limiting instruction; petitioner did not. When the State asked the Green Court to apply harmless error, the Court refused, holding, "Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless." Id. at 434, 527 S.E.2d at 101. Unlike the jury in Green, petitioner's jury was not specifically told they could not use his pending lynching charge for the impermissible inference that because petitioner was a violent person, he must have committed this murder. The lack of any limiting instruction enhances the prejudice to petitioner.

In another similar PCR case, trial counsel's failure to object to inadmissible character evidence prejudiced the petitioner, resulting in a new trial. German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996). German, like Green, was also a drug case. Id. at 26, 478 S.E.2d at 688. The solicitor told the jury in his opening statement that drug agents received several tips the defendant was selling crack. Id. Trial counsel failed to object during the opening and also failed to ask for a curative instruction after objecting when the officer testified about the tips. Id. at 26-28, 478 S.E.2d at 688. Holding trial counsel ineffective and reversing, the Court found she should have "objected to these statements as improper comments on petitioner's character." Id.

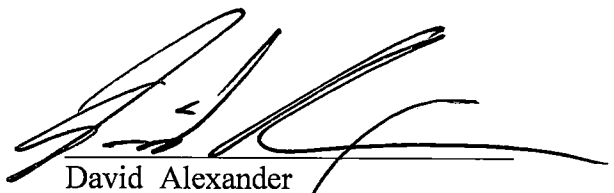
In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), this Court reversed a murder conviction because of the improper admission of the defendant's prior firearms convictions. The

Court concluded the admission of the prior convictions was not harmless and linked the admission of the offenses to the defendant's credibility. Bryant at 518-19, 633 S.E.2d at 156. Here, petitioner did not testify, but his statement to police in which he told them his clothing had been stolen and gave his whereabouts on the night of the shooting was admitted into evidence. App. 351, l. 9 – 354, l. 1. Unfortunately, the policeman's reading of petitioner's statement began with letting the jury know that petitioner was out on bond for lynching. This negatively affected all of the petitioner's information about his whereabouts that came after the information about the lynching. As noted in Smalls, the specific harm of the error is important as is the context of the case. Here, the specific harm likely caused the jury to disregard petitioner's statement and infer that he was dangerous and predisposed to violence.

The lynching charge was similar in kind to the murder charge in that they both involve violence. The inadmissible lynching evidence allowed the jury to convict petitioner on an improper basis in this close case where a witness to the crime who knew petitioner did not identify him as the shooter. This Court should reverse petitioner's convictions and grant him a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of granting petitioner a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Honorable D. Craig Brown, Circuit Court Judge

ANTRELL RASHAWN FELDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Antrell Rashawn Felder, #309617, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of October, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of October, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.