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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002364

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SC Court of Appeals

Larry James Tyler,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Was trial counsel ineffective in failing to move to sever the trial of Petitioner's charge for second-degree sexual exploitation of a minor from the trial of his remaining charges?

RESPONDENT'S ISSUE PRESENTED

Did the lower court deny post-conviction relief for trial counsel's alleged failure to sever the charges where the evidence to establish the *res gestae* of each crime was largely the same, where the evidence of each crime was probative to establishing motive and intent of each other crime, and where Petitioner was deprived of no rights by virtue of the consolidated trial?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Petitioner was indicted at the February 2013 term of the Darlington County Grand Jury for criminal solicitation of a minor (2013-GS-16-00603), sexual exploitation of a minor, second degree (2013-GS-16-00604), contributing to the delinquency of a minor (2013-GS-16-00605), and disseminating harmful material to minors (2013-GS-16-00606). J. Richard Jones, Esq. represented Petitioner. John W. Holt, IV, Esq., and Patti McKenzie Parker, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 25, 2013, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Petitioner guilty as indicted on February 27, 2013. Judge Burch sentenced Petitioner to imprisonment for concurrent terms of eight years for solicitation, eight years for exploitation, three years for contributing to delinquency, and eight years for disseminating.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., who raised the following issue:

> Whether the trial court erred in refusing to grant a directed verdict to the charge of contributing to the delinquency of a minor when the State failed to present any substantial evidence beyond a reasonable doubt that appellant did anything to make the minor delinquent as alleged by the indictment?

The parties proceeded to oral arguments before the South Carolina Court of Appeals on Ocotber 8, 2014. Counsel Pachak represented Applicant, and Jennifer Ellis Roberts, Esq., of the South Carolina Attorney General's Office, represented the State. By unpublished opinion decided January 14, 2015, the Court of Appeals affirmed Petitioner's convictions. State v. Tyler, Op. No. 2015-UP-025 (S.C. Ct. App. filed Jan. 14, 2015). The Remittitur was issued on January 30, 2015.

Petitioner filed his application for post-conviction relief on January 2, 2015 (2015-CP-16-00016). He alleged the following grounds for relief in his application (excerpted verbatim):

1. "Defendant's trial counsel rendered ineffective assistance by failing to object to the consolidation of trials defendant was entitled to have severed. It is very clear that Defendant was entitled to have two (2) [separate] trials, but was only permitted one unfair, prejudicial trial."
2. "Defendant's trial counsel rendered ineffective assistance by failing to challenge the validity of the search of Appellant's home, computer and e-mail as well as the admissibility of any evidence seized as a result of said search."
3. "Defendant's trial counsel rendered ineffective assistance by failing to object, specifically to the admission of any photos obtained from Defendant's e-mail account which is not on his computer, all of which were irrelevant and inflammatory."
4. "Defendant's trial counsel rendered ineffective assistance by failing to remedy the double jeopardy violations with respect to Defendant's criminal solicitation of a minor and contributing to the delinquency of a minor conviction."
5. "Defendant's appellate counsel rendered ineffective assistance on appeal by abandoning on appeal Defendant's properly preserved motion for directed verdict on all counts due to insufficient evidence, and by refusing to submit Defendant's argument on appeal as to the sufficiency of the evidence."

Respondent made its return on May 15, 2015, and amended it by filing on September 14, 2015. An evidentiary hearing into the matter was convened on July 18, 2016, before the Honorable G. Thomas Cooper. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. J. Rutledge Johnson, Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated November 2, 2016, and filed November 4, 2016, Judge Cooper denied and dismissed the application.

STATEMENT OF FACTS

Victim and her sister accompanied their grandmother, Dorris Brown, to her friend Ernestine Witherspoon's house on numerous occasions. (Appx. 44-45). On one visit, Petitioner, who was Ms. Witherspoon's son, gave Victim and her sister a cell phone. (Appx. 45, ll. 15-19; Appx. 54, ll. 5-17; Appx. 65, ll. 5-14). The girls began looking at the pictures on the phone and saw girls in bathing suits and one picture of Petitioner in blue underwear. (Appx. 55, ll. 8-17; Appx. 65, ll. 18-23). Ms. Brown returned the phone to Petitioner after Victim told her that her sister said there were pictures of naked men on the phone. (Appx. 45-46).

Tyquan Brown, the girls' twenty-one-year-old cousin, visited Ms. Witherspoon's house and Petitioner asked him and his mother if they wanted a cell phone. (Appx. 68-69). Tyquan's mother gave him the cell phone and when he got home he began to delete items from the phone. (Appx. 69, ll. 22-25). He noticed some draft versions of text messages that contained Victim's name in the titles. (Appx. 71, ll. 4-23). After reading the drafts, he realized they referred to Petitioner wanting Victim in his bed and he notified Victim's mother, Georgita Brown. (Appx. 72-73). Georgita called the police, and the police arrested Petitioner initially for driving under suspension and then charged him with the charges for which he was ultimately convicted. (Appx. 81, ll. 13-17; Appx. 89, ll. 4-9).

At trial, twelve-year-old Victim testified that when she was around Petitioner, he would take pictures of her and her sister, sometimes without adults in the room. (Appx. 52-53). She also explained that Petitioner played a racing game with her and her sister where, "[h]e said that if he win[s] he get[s] a hug, and if we win we get a dollar." (Appx. 53, ll. 5-12). She acknowledged that she never won a dollar but that she received a lot of hugs from Petitioner. (Appx. 53, ll. 13-18). She identified the cell phone Petitioner gave her and her sister. (Appx. 53-

54). She stated that she saw pictures on the phone of a girl in bikinis and of Petitioner in blue underwear. (Appx. 55, ll. 5-17). Victim testified that Petitioner liked her more than her sister because he took more pictures of her. (Appx. 55-56).

Victim's ten-year-old sister ("Sister") also testified Petitioner took more pictures of Victim than of her and he played a racing game where he would win hugs. (Appx. 64, ll. 3-16). Sister admitted she was more outgoing and more of a talker than Victim. (Appx. 64, ll. 17-21). Sister testified she looked at the pictures on the cell phone and saw some of girls in bathing suits and one of Petitioner in blue underwear. (Appx. 65, ll. 18-23). Sister stated the pictures made her feel uncomfortable, and she told her grandmother, "Grandma, there are some naked pictures of him." (Appx. 66, ll. 8-12). Sister agreed Petitioner paid more attention to Victim than to her and testified Victim received a lot of hugs from Petitioner. (Appx. 66-67). She explained that she told her father, "[h]e keep[s] hugging on us." (Appx. 64, ll. 7-11).

Tyquan Brown testified regarding the cell phone Petitioner gave him and the pictures that were on it. (Appx. 70, ll. 1-17). He described one picture as the Petitioner in a blue Speedo. (Appx. 70, line 18). He also saw pictures of women and children. (Appx. 70, ll. 19-20). Tyquan deleted most of the pictures so he could start using the phone. (Appx. 70-71). He then noticed some unsent draft text messages that were labeled using Victim's name. (Appx. 71, ll. 4-18). He read them and saw that they appeared to be for Victim because they acknowledged she was a little girl and mentioned Sister by name. (Appx. 71-72). Tyquan notified Victim's mother. (Appx. 72, ll. 16-21).

Georgita Brown, Victim's mother, testified next. (Appx. 79, ll. 3-24). She explained that Tyquan called her and she went to pick up the cell phone from him. (Appx. 80, ll. 7-19). She testified she saw a picture on the phone of Petitioner in a blue Speedo with no other clothing on.

(Appx. 80, ll. 20-21). She then read the draft text messages and became disturbed enough to call the police. (Appx. 80, ll. 23-25). She met Deputy Eric Hodges in the parking lot of a Roses grocery store, and he sent her to retrieve the box for the phone. (Appx. 81-82). At that point her aunt, who was riding in the car with her, noticed Petitioner nearby. (Appx. 82, ll. 14-25). Georgita told Officer Hodges that Petitioner was at a nearby garage. (Appx. 83, ll. 11-13).

Deputy Eric Hodges of the Darlington County Sheriff's Office testified that after learning where Petitioner was, he approached him and arrested him for driving under suspension, advised him of his Miranda rights, and told him he was working on another investigation for which Petitioner agreed to answer questions. (Appx. 88-89).

Deputy Russell Harrell testified next regarding his assistance in obtaining items from Petitioner's residence pursuant to a search warrant. (Appx. 99, ll. 14-25). Harrell explained that he collected from Petitioner's residence a computer, hard drive, multiple cell phones, "various other digital items and some paperwork." (Appx. 99-100). He read out the draft text messages he was able to retrieve from the cell phone in question:

> Number One: It was in the status folder is sent. Folder is sent. Type is outgoing. Text reads as follows: "[Victim] Two, to fall in love with a little girl as young as you are, but I can't stop my heart from loving you, girl. I wish I had another hour alone with you and nobody knew."
>
> Number Two: Says it's unsent in the drafts folder. Type is outgoing. Reads J5, "Me in trouble. Please, [Victim] especially don't tell [redacted]. She will surely tell someone. This is just between you and me, my love."
>
> Number Three: Unsent status. Drafts folder. Type is outgoing. J4: "Never want to be apart from each other ever again. I love you, little [angel]. Wish I could make you my wife. If I could you – if I could you would be in my bed tonight. Don't get me."
>
> Number Four says it's unsent. Folder is draft. Type is outgoing. J3: "Where we were. I would how you know how much I love you, [Victim] by

holding you close to me and plant a kiss on your lovely lips so powerful that we both would never."

. . .

Number Five – excuse me. It's unsent, drafts and also outgoing: "[Victim], you were so beautiful. Please don't tell anyone what I am telling you. First time I ever saw you, [Victim] I fell for you. I know a man should not suppose."

(Appx. 102-03). A printout of those messages was admitted as State's Exhibit 11 without objection. (Appx. 101-02).

At the evidentiary hearing, Counsel recalled that the State obtained search warrants for Petitioner's phone, house, computers, and then his Yahoo account. (Appx. 251, ll. 11-22). Notably, Counsel testified that a computer expert hired for Applicant's defense "found a whole lot more damaging information on [Petitioner's] computer than the State had found[,]" which prompted Counsel to "shut him down[.]" (Appx. 252, ll. 11-20). Counsel further managed to reduce the most damning picture, of anal sex with a young child, by shrinking it and blending it among other pictures. (Appx. 252-53). Asked why he did not attempt to sever the charges, Counsel responded: "Again, based on the theory that we had developed, first of all, the information we felt had not been sufficiently communicated to the young lady on the four charges dealing with her. And the exploitation, the pictures, except for one, we felt we could minimize." (Appx. 254, ll. 9-13). On cross-examination, Counsel testified that he and Petitioner did not discuss the possibility of severance in detail. (Appx. 259, ll. 14-21). Counsel acknowledged Petitioner's argument that without severing the charges, "perhaps one would lead the jury to believe the other[,]" but denied that the argument was applicable to Petitioner's case. (Appx. 259-60).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL HAD NO BASIS TO MOVE TO SEVER THE CHARGES WHERE THE FACTS PROVIDING FOR EACH CHARGE WERE PART OF THE SAME *RES GESTAE*, WERE PROBATIVE OF EACH CRIME CHARGED, AND WHERE PETITIONER WAS DEPRIVED OF NO RIGHTS AS A CONSEQUENCE OF THE CONSOLIDATED TRIAL.

The PCR court properly denied post-conviction relief because when a single investigation from a single incident results in the discovery of multiple crimes of the same general nature, they are properly tried together.

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." State v. Beekman, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016). Even where charges may not rise out of a single, isolated incident, the Supreme Court has "allowed joinder when the crimes involved connected transactions closely related in kind, place, and character." Id., 415 S.C. at 637, 785 S.E.2d at 205 (quoting State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005)); see also State v. Rice, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006) ("Offenses are considered to be of the same general nature where they are interconnected."). Courts should avoid the "inflexible application" of the rule that charges must arise out of the same set of circumstances to warrant joinder; if "it does not appear that any real right of the defendant has been jeopardized, [then] it would be a refinement not demanded by the law or by justice to require in all instances a separate trial[.]" City of Greenville v. Chapman, 210 S.C. 157, 161-62, 41 S.E.2d 865, 867 (1947).

That joinder of related offenses may result in the introduction of evidence that is relevant to one or more, but not all, of the charges, is not in and of itself an adequate basis for severance

of charges into multiple trials. Beekman, 415 S.C. at 638-39, 785 S.E.2d at 205-06 (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)).

This Court's treatment of the facts in State v. Rice is instructive. In Rice, the defendant was separately indicted for trafficking in cocaine and murder—wholly unrelated crimes, though the former all too often leads to the latter. 368 S.C. at 615, 629 S.E.2d at 396. "The cocaine trafficking charge arose out of a traffic stop the police set up because they suspected Rice of Johnson's murder. The police found the gun believed to be the murder weapon in the same search that produced the cocaine that forms the basis of the cocaine trafficking charge." Id. The Court of Appeals further observed the motive for the murder related to the victim's theft of drugs and money from Rice, and that their relationship was mostly based on selling drugs. Id. Consequently, the Court of Appeals held that "[t]he information regarding the cocaine trafficking was relevant to show the complete, whole, unfragmented story[,]" and found Rice was not prejudiced by the joinder of the charges. Id., 368 S.C. at 616, 629 S.E.2d at 396 (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

The charges at issue here are much more closely related and of the same general character than was approved in Rice. Each charge revolves around Petitioner's singular motive: his own sexual gratification at the expense of young girls. The charges against Petitioner arose out of the same circumstances—the discovery of solicitous texts on Petitioner's cell phone, which beget search warrants for Petitioner's phone, house, computers, and Yahoo account, the last of which produced the most explicit photograph known to law enforcement at the time. The same evidence proved each case—the same testimony provides for how law enforcement was led to investigate Petitioner and reveal his various illegal actions taken for the purpose of his own sexual gratification. That a grotesque image was discovered on Petitioner's computer as part of

the investigation into his solicitation of Victim forms a part of the *res gestae*, of the immediate context through which each of these crimes was inextricably entwined.

Petitioner's own arguments discounting his shutterbug tendencies towards Victim and solicitous texts to the same (See Petition for Writ of Certiorari at 11-12) demonstrates precisely why the explicit photograph on his Yahoo account was relevant to all of the charges brought. The Yahoo photograph provides the context necessary to firmly establish that Petitioner's intent in all of his actions was exploitative and pedophilic. By way of hypothetical, it would not be illegal[1] or untoward for a person to take photographs of an old, ornate, and architecturally distinguished bank on the morning of a beautiful sunrise. However, if that same person shortly thereafter endeavors to rob that bank, the previous act of taking pictures outside is less innocent, and becomes evidence that he or she was, in fact, casing the bank. Similarly, if one keeps a variety of pictures of their (or their friends' or relatives') children, they are most likely just keeping pictures of loved ones. However, if one keeps the same pictures alongside photographs of children in implicitly and explicitly sexual circumstances, the purpose of keeping the "innocent" pictures is contextually changed, and one may permissibly infer that the "innocent" pictures are not so innocently kept, but rather are organized for the purpose of the keeper's pedophilic sexual gratification. Consequently, the "innocent" pictures taken and stored become probative and relevant to show a common scheme or plan (sexual interest in girls of a young age), as well as to disprove arguments that explicitly pedophilic materials were acquired by accident, or that solicitous messages were erroneously made available to the minor addressee. See Rule 404(b), SCRE (evidence of other bad acts admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.); cf. State

[1] As far as the undersigned is aware.

v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 278 (2009) (where the similarities between bad acts outweighs the dissimilarities, the bad act evidence is admissible).

What Petitioner condemns as a prosecution "for who he is" is more accurately a prosecution of the undivided whole of his criminal conduct, each part properly illuminated by each other part, all of which revolves around his efforts to obtain the pictures, attention, and affections necessary to satisfy his sexual predilection for young girls. Counsel correctly concluded he had no basis to demand severance, such that the PCR court correctly concluded Petitioner was not entitled to relief.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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Senior Assistant Deputy Attorney General

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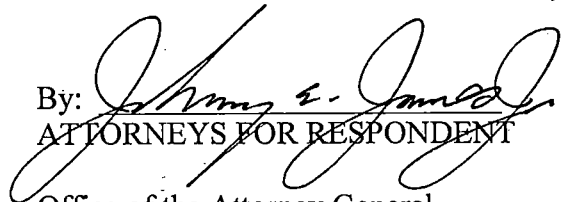
By: 
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1 March, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002364

LARRY TYLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari, Motion to Supplement Appendix, and Supplemental Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
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Post Office Box 11589
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This 1st day of March, 2019.

CARSON KIRK
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

March 1, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Larry Tyler v. State of South Carolina**
Appellate Case No. 2016-002364
Lower Court Case No. 2015-CP-16-0016

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari, Motion to Supplement Appendix, and Supplemental Appendix** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/ck
Enclosures

cc: Victor R. Seeger, Esquire