

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge
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RUSSELL MONTGOMERY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001099
—————

PETITION FOR WRIT OF CERTIORARI
—————

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¹ 401 S.C. 238, 736 S.E.2d 688 (S.C. Ct. App. 2013); and 414 S.C.468, 779 S.E.2d 789 (S.C. 2015).

ISSUE PRESENTED

The PCR judge erred in dismissing petitioner's PCR claim that the new rule prohibiting impeachment via the use of a prior armed robbery conviction per the holding in State v. Broadnax² should apply retroactively to his case.

² 401 S.C. 238, 736 S.E.2d 688 (S.C. Ct. App. 2013); and 414 S.C.468, 779 S.E.2d 789 (S.C. 2015).

STATEMENT OF THE CASE

Petitioner Russell Montgomery was convicted of robbery and kidnapping during the July 2003 term of the Orangeburg County General Sessions Court before Judge Edward B. Cottingham. Petitioner was represented by Peggy Hinds at trial, and Assistant Solicitor Angela Garrick Avinger appeared on behalf of the state. Judge Cottingham sentenced petitioner to imprisonment for an aggregate term of thirty-five years. App. 1-328. Petitioner appealed, but his case was subsequently dismissed by the South Carolina Court of Appeals. See State v. Montgomery, Op. No. 2005-UP-285 (S.C. Ct. App. Filed April 20, 2005). Petitioner was represented on direct appeal by Robert M. Dudek, Chief Attorney for the Appellate Division of the South Carolina Commission on Indigent Defense.

On September 27, 2013, petitioner filed a third PCR application with the Orangeburg County Office of the Clerk of Court. App. 329-339. The respondent filed a Return and Motion to Dismiss dated May 16, 2014, on the ground that the action was successive and untimely filed.³ App. 340-347. A Conditional Order of Dismissal was signed on May 26, 2014, on the identical grounds echoed in the Return and Motion to Dismiss filed in the case.

A PCR hearing was held in the case on July 20, 2017, at the Orangeburg County Courthouse before Judge Edgar W. Dickson, Petitioner was present at the hearing and represented by Arthur Aiken and Assistant Attorney General Ruston Neely appeared on behalf of the state. App. 357-371.

On June 6, 2019, Judge Dickson filed an Order of Dismissal denying PCR relief to petitioner. Petitioner appealed Judge Dickson's Order of Dismissal. This petition follows.

³ Petitioner filed his first PCR action in February 21, 2006, and per an evidentiary hearing held in in the case, an Order of Dismissal was filed on June 26, 2005, by Judge James C. Williams. Petitioner's PCR appeal was denied on January 30, 2009, by the South Carolina Court of Appeals. Petitioner's second PCR application was filed on July 20, 2011, but dismissed via Order of Dismissal signed on May 16, 2013, by Judge Edgar W. Dickson.

ARGUMENT

The PCR judge erred in dismissing petitioner's PCR claim that the new rule prohibiting impeachment via the use of a prior armed robbery conviction per the holding in State v. Broadnax⁴ should apply retroactively to his case.

At trial, Travis Guess testified that he was inside his trailer on July 12, 2002, when a male holding a gun entered and fired a gunshot downward. Travis stated that when the gunman asked for his money, then he surrendered his money. Thereafter, the gunman asked for his (Guess') car keys and after that the two of them ended up inside his (Guess') vehicle. Guess stated that although he was driving the vehicle, at some point he (Guess) jumped out of the vehicle and fled. The vehicle continued on until it struck a utility pole. At that time, police had arrived at the scene of the crash and found and arrested petitioner nearby. Guess stated that he recognized the gunman as petitioner as he had been seen before in the trailer park. App. 99, l. 1 - p. 110, l. 19.

Kevin Mack and Marcus Guess, both of whom testified at trial, stated that they were in Travis Guess' trailer and saw the gunman enter, but managed to flee shortly thereafter. App. 66, l. 1 – App. 83, l. 12. Police Officer Ketcherside testified that Travis Guess identified petitioner as the perpetrator. App. 148, l. 1 – p. 168, l. 3. The gun was found in the area where the gunman fled after the vehicle collided with the utility pole. App. 182, lines 1-25. Guess' wallet was in the gunman's possession when he was apprehended. Tr. 172, l. 1 – p. 173, l. 24.

At trial, petitioner testified in his defense and explained that he and Travis Guess were connected through their mutual drug dealings, and that he had previously purchased drugs from Travis Guess. Petitioner went on to explain that on the date in question, he appeared at Guess' trailer to "buy a fifty dollar slab," and that Guess asked him to ride to another trailer park to

⁴ 401 S.C. 238, 736 S.E.2d 688 (S.C. Ct. App. 2013); and 414 S.C.468, 779 S.E.2d 789 (S.C. 2015).

make a sale; and during the drive there, he (petitioner) looked inside a cigar box that Guess had and argued with Guess after seeing that the box contained presumably what had been deemed insufficient drugs. The accident followed. Petitioner stated that he had no gun on him at that time and that he never threatened Guess. App. 232, 1.1-p. 237, 1.16.

During petitioner's testimony, the solicitor asked the following questions:

Solicitor: ...And you've had two convictions for strong arm robbery, isn't that right?

Petitioner: Yes, ma'am.

Solicitor: Okay. So you're a thief?

Petitioner: They had me charged with, like talking little speaker. Me and another fellow, but I was younger back then, I paid my debt for that. App 244, 1.7-13.

Before petitioner testified, trial counsel addressed the issue of petitioner's prior record and objected to the use of petitioner's prior 1993 and 1995 robbery convictions for the purpose of impeachment. App.223, 1.14-p.224, 17. The trial judge ruled as follows:

Court: I will let both robberies in, and finding that in each instance they are within the ten year period, and by the section itself involved, those cases are admissible without the necessity of deciding the prejudicial effect versus the probative value App. 226, 1.4-13.

No testimony was taken during petitioner's PCR hearing. Instead PCR counsel argued that Broadnax applied retroactively to petitioner's 2003 trial per the argument that it was error to impeach petitioner with his two prior robbery convictions. App. 359, 1. 1 – p. 370, 1. 7. The PCR judge ruled that Broadnax did not qualify as a new rule of law that was applicable retroactively to petitioner's case. App. 373-383.

On March 3, 2003, the Court of Appeals held in State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 321, (2003), that armed robbery was a crime of dishonesty and could be used to impeach a witness under Rule 609 (a)(2), SCRE, and therefore no balancing test of the prior under Rule 609 (a)(1), SCRE was required. Petitioner's trial was held on July 16, 2003. However, on September 7, 2013, in State v. Broadnax, 401 S.C. 238, 736 S.C.2d 688 (2013), the Court of Appeals held that armed robbery was not a crime of dishonesty and thus the trial judge erred in using the defendant's prior armed robbery conviction for the purpose of impeachment automatically under Rule 609(a)(2), SCRE, and that the trial judge should have applied the balancing act under Rule 609 (a)(1), SCRE, at trial to determine the admissibility of the prior armed robbery convictions against the defendant. On appeal to the South Carolina Supreme Court, the South Carolina Supreme Court's July 8, 2015 holding in State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015), was that armed robbery was not a crime of dishonesty and overruled Al-Amin, supra, and agreed that a balancing analysis under Rule 609 (a)(1) SCRE, was necessary in such cases.

Clearly, the new rule in both Broadnax cases came after petitioner's trial, but the new rule in Broadnax was nonetheless applicable in his case to the extent that the trial judge improperly allowed his prior robbery convictions to be used to impeach him without a balancing determination required by Rule 609(a)(1), SCRE. Here, the trial judge erred in allowing impeachment via petitioner's prior robbery convictions automatically without failing to conduct a balancing test to assess prejudice before ruling on the admissibility of petitioner's priors in the case. Broadnax applied retroactively to petitioner's case. The holding in Teague v. Lane, 489 U.S. 288 (1989), governs whether a new rule of criminal procedure is retroactive. Retroactivity occurs if the new rule is substantive or if the new rule is a "watershed rule of criminal procedure"

that implicates the fundamental fairness and accuracy of the proceeding that are implicit in the concept of ordered liberty. See Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007); Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). A new rule is one where the result was not dictated by precedent existing at the time of the conviction. In Aiken v. Byers, *supra*, the Court held that that rule in Miller v. Alabama, 132 S.Ct. 2455 (2012), applied retroactively in the case. Miller held that the mandatory imposition of LWOP sentences to juveniles violated the Eighth Amendment. In Talley, the Court held that the new rule in Alabama v. Shelton 535 U.S. 654 (2002) applied retroactively.

Here, the new impeachment rule under Broadnax was a watershed rule of criminal procedure that required retroactive application to petitioner's case. Thus, a balancing test should have been applied before admitting petitioner's priors against him at trial; and had such a test been conducted, then a reasonable probability exists that the outcome of petitioner's trial would have been different. Also, the impeachment of petitioner with his robbery priors could not have been considered harmless error in this case because credibility was the main issue (what Guess said versus what petitioner said) against the backdrop of a drug deal between the two men that went terribly wrong. New rules are applied retroactively on collateral review. Finally, under a balancing test announced in State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (S.C. Ct. App. 1998), the following factors should have been considered:

1. The impeachment value of the prior crime;
2. The point in time of the conviction and the witness' subsequent history.
3. The similarity of the past crime and the charged crime;
4. The importance of the defendant's testimony; and
5. The centrality of the credibility issue.

The PCR judge erred in dismissing petitioner's PCR issue regarding the retroactive applicability of the new rule in Broadnax to his case.

CONCLUSION

Based on the foregoing argument, counsel would respectfully request that this Court grant the petition and allow full briefing on the above-raised issue.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2020.