

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

—————
Appeal from Colleton County

Honorable Steven H. John, Circuit Court Judge
—————

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Jun 01 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KELVIN GANTT,

APPELLANT

APPELLATE CASE NO 2019-001052
—————

FINAL BRIEF OF APPELLANT
—————

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by not properly evaluating the Colf factors and admitting Appellant's prior conviction for possession of cocaine?

STATEMENT OF THE CASE

In October of 2017, the Colleton County Grand Jury indicted Appellant, Kelvin Gant, for attempted murder and possession of a weapon during the commission of a violent crime, indictments #2017-GS-15-699, 700. On June 17, 2019, Appellant proceeded to jury trial before the Honorable Steven H. John. Helen Dovell represented Appellant at trial. Ceth Utsey and Catherine Orville prosecuted the case. The jury returned verdicts of guilty. Judge John sentenced Appellant to twenty (20) years for attempted murder and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was served on June 20, 2019. This appeal follows.

STANDARD OF REVIEW

“In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). ‘The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law.’ State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001). ‘An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.’ State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).” State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019).

ARGUMENT

The trial judge abused his discretion by not properly evaluating the Colf factors and admitting Appellant's prior conviction for possession of cocaine.

The jury found Appellant guilty of shooting Herbert Brown outside of the store/club that Brown's common law wife, Karen Holmes, operated illegally. The police responded to this shooting call at approximately 11:30 PM on June 24, 2017. (R. p. 61, line 17 – p. 62, 63, lines 1-10). Brown identified Appellant as the shooter. (R. pp. 114-116). Earlier in the evening, around 9:30 PM, Karen Holmes called the police after hearing shots fired. (R. p. 23, line 24 – p. 24, lines 1-25). The police arrived at the store/club and then went down the street to Ruben Boatwright's house. (R. p. 58, lines 1-10). Appellant was at Boatwright's house when the police arrived. Appellant can be seen in a video from a police body camera. (R. p. 169, line 9 - p. 170, lines 1-17; p. 58, lines 1-10). Appellant is seen wearing a Nike shoe on one foot and a flip flop on the other foot. (R. p. 170, lines 1-17).

Appellant testified that on the night of the shooting he was at Ruben Boatwright's house with friends and recovering from being shot in the foot. (R. p. 168, line 5 – p. 169, 170, lines 1-17). The injury caused Appellant to limp. (R. p. 174, lines 10-13). Appellant testified that around 11:25 PM he left Boatwright's house with Jahleel who drove Appellant to his aunt's house. (R. p. 172, lines 6-12). Jahleel Dubois testified that he was with Appellant at Boatwright's house on June 24, 2017 and took Appellant home to his aunt's house between 11:10 and 11:20 PM. (R. p. 205, line 12 – p. 206, line 1). Appellant denied shooting Brown. (R. p. 167, lines 23-24). Appellant denied being at the club/store on the night of the shooting. (R. p. 172, lines 2-5). No witness testified that the shooter walked with a limp.

Prior to Appellant's testimony the State advised the judge that Appellant had a possession of cocaine conviction from March of 2017. (R. p. 155, lines 8-15). Appellant objected to the

admission of the prior conviction. (R. p. 155, line 18 – p. 156, lines 1-10). The judge overruled the objection and stated:

All right. First, under 609, I do find that this is evidence, that the accused has been convicted of a crime that is proper under 609. Now as to the – and it fits the time limit -- it fits the requirements regarding the statutory penalty.

Now as to whether or not under 403 that it would be inadmissible, an analysis on whether or not the probative value would outweigh its prejudicial effect. The jury is called upon to examine the evidence. And in looking at 609, I have to look at the impeachment value of this prior crime, the point in time of conviction, and where we are in regards to this case, if there is any similarity that might call for a cautionary instruction from the Court, if it was some other kind of possession of a weapon during the commission of a violent crime or something like that.

The importance of the testimony, as you indicated, credibility and believability and, you know, whether or not the credibility is important to this particular case. I do find in this particular case that it is an important factor for the jury's determination regarding this particular matter. I find it to be proper, and I will allow the State to ask if he has been convicted of this crime in the past.

(R. p. 156, line 13 – p. 157, lines 1-11). During direct examination counsel for Appellant asked, “Okay. And, Kelvin, do you have any prior convictions?” (R. p. 174, lines 14-15). Appellant answered, “Yes, I have a cocaine charge.” (R. p. 174, line 16). Appellant confirmed that the cocaine charge was for possession. (R. p. 174, lines 17-19). While the trial judge correctly noted the five Colf factors, he only made findings in regard to one factor, credibility. The trial judge erred.

Rule 609(a)(1) provides:

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; . . .

The trial judge correctly found that the prior conviction for possession of cocaine qualified pursuant to Rule 609(a)(1). Rule 609(a)(2) addresses convictions for crimes of dishonesty or false statement. Possession of cocaine is not a crime of dishonesty or false statement. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)). Rule 609(b) addresses convictions outside of the ten-year time frame. Appellant’s prior 2017 conviction for possession of cocaine is within the ten year time frame.

In State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019), the South Carolina Supreme Court wrote, “[I]f the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the Colf¹ factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused. The burden of establishing admissibility is upon the State, the proponent of the evidence.” Addressing the Colf factors the Court in Robinson wrote:

In Colf, we adopted the five-factor analysis employed by federal courts when weighing the probative value of prior convictions against the prejudicial effect to the accused. Id. at 627, 525 S.E.2d at 248. These factors include:

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

Id. “These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case.” Id. Although Colf focused on the admission of prior convictions more than ten years old under Rule 609(b), our courts have also consistently applied these factors for purposes of a Rule 609(a)(1) analysis. See, e.g., Bryant², 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1.

¹ State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

² State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

426 S.C. at 594, 828 S.E.2d at 211.

As to the first Colf factor, the impeachment value of the prior crime, the trial judge in the present case mentioned impeachment value (R. p. 156, line 23), but failed to make a finding in regard to this factor. In Robinson the Court wrote:

“The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility.” State v. Black, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). “The tendency to impact credibility ... determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness.” Id. at 21-22, 732 S.E.2d at 887. The purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility. Id. at 22, 732 S.E.2d at 887.

426 S.C. at 597–98, 828 S.E.2d at 212–13. The trial judge in the present case should have found that the impeachment value of the possession of cocaine offense was very low. As noted by the Court in Bryant in making a Rule 609(a)(2) analysis, “Violations of narcotics laws are generally not probative of truthfulness. Furthermore, a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. Likewise, firearms violations also are not generally probative of truthfulness.” Bryant, 369 S.C. at 517, 633 S.E.2d at 155-56 (internal citations omitted). The trial judge erred in failing to find that the impeachment value of the prior conviction was low.

As to the second and third Colf factors, point in time of the conviction and the witness's subsequent history and similarity between the past crime and the charged crime, the trial judge mentioned these factors (R. p. 156, line 23- p. 157, lines 1-3), but failed to make a finding in regard to point in time. With regard to similarity the judge stated, “[I]f there is any similarity that might call for a cautionary instruction from the Court, if it was some other kind of possession of a weapon during the commission of a violent crime or something like that.” (R. p.

156, line 25 – p. 157, lines 1-3). The cautionary instruction is not part of the Colf balancing. In this case, however, the possession of cocaine from 2017 was not similar and was close in time.

As to the fourth factor, importance of the defendant's testimony, the trial judge stated, "The importance of the testimony, as you indicated, credibility and believability and, you know, whether or not the credibility is important to this particular case. I do find in this particular case that it is an important factor for the jury's consideration regarding this matter. I find it to be proper, and I will allow the State to ask if has been convicted of this crime in the past." (R. p. 157, lines 4-11). The trial judge appears to have skipped the fourth factor and went straight to the fifth factor, the centrality of the credibility issue. This was error. A proper review of the fourth factor shows that Appellant's testimony was important. Appellant denied shooting Brown. Appellant testified that he left Boatwright's house with Jahleel and denied being at the store/club when Brown was shot. While credibility was a central issue in the present case and this factor weighs in favor of admission, see Robinson, the trial judge failed to balance this factor against the importance of Appellant's testimony and the very low impeachment value of the prior possession of cocaine. The error constitutes an abuse of discretion requiring reversal.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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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Respectfully Submitted,

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This 1st day of June, 2020.