

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Hampton County

Perry M. Buckner, Circuit Court Judge

S.C. Supreme Court

Opinion No. 2012-UP-632 (S.C. Ct. App. filed 11/28/2012)

10-GS-25-026-030.

THE STATE,

RESPONDENT,

V.

STEVIE LAMONT AIKEN,

PETITIONER

Appellate Case No. 2013-000399

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 25, 2013. App. 8.

QUESTION PRESENTED

Did the Court of Appeals err in holding the trial judge's limitation on Petitioner's cross-examination of a key state's witness, and alleged co-conspirator to these crimes, about the potential sentences he could receive for his participation was harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Petitioner was indicted by the Hampton County grand jury for assault and battery with intent to kill, possession of a weapon during a violent crime, armed robbery, kidnapping, and burglary, first degree during the March and November, 2010 terms. R. 451-465. He was tried before the Honorable Perry M. Buckner, III and a jury between March 7th - 9th, 2011. He was represented by Stephen Plexico. R. 1. He was convicted and sentenced to thirty-five years for burglary, thirty years for kidnapping, twenty years for armed robbery, twenty years for assault and battery with intent to kill, and five years for possession of a weapon during the commission of a violent crime. R. 430, lines 5-23; R. 445, line 14 – R. 446, line 5; R. 466-470. The sentences were ordered to run concurrently. R. 446, lines 6-7.

Petitioner filed a timely notice of appeal, which was perfected. On November 28, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished decision. State v. Aiken, 2012-UP-632 (Ct. App. filed Nov. 28, 2012); App. 1-2. Petitioner filed a petition for rehearing on December 12, 2012. App. 3-7. The Court of Appeals denied the petition by order dated January 25, 2013. App. 8.

Petitioner now files this timely petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred in holding the trial judge's limitation on Petitioner's cross-examination of a key state's witness, and alleged co-conspirator to these crimes, about the potential sentences he could receive for his participation was harmless beyond a reasonable doubt.

Relevant facts

The victim, Margaret Gooding, lived alone, and in the relatively isolated area of Miley, South Carolina, a small town outside of Walterboro. R. 125, ll. 13-15. Around midnight, on December 6, 2009, her neighbor heard a gunshot. R. 127, l. 17 – R. 128, l. 11. He looked across to the victim's home, and noticed that the lights were on inside her house. R. 129, ll. 1-3. Her neighbor then called her family members, Odis and Martha Ann Gooding, and told them that he heard a gunshot. They said they would call 911. The neighbor looked out the window again and saw that the victim's car was gone. R. 129, ll. 4-21.

The victim's sister-in-law testified that the victim was seventy-nine years old, and in poor health. R. 134, l. 8 – R. 135, l. 1. She also testified that she had spoken to her sister-in-law between 10:00 pm and 11:00 pm that evening. R. 135, ll. 13-20. After he received a phone call from the victim's neighbor, Odis Gooding traveled to the victim's home and saw that her bedroom window was broken out, and he observed bullet holes. R. 141, l. 4 – R. 142, l. 12.

Corporal Bridges, with the Hampton County Sheriff's Office responded to the victim's home that night. He noticed that her car was gone. R. 150, l. 11 – R. 155, l. 8. He also noticed that the door to her house was unlocked, and that there was a blood trail in the house. R. 156, l. 6 – R. 159, l. 20. Once the officer noticed that her car was missing, the officer issued a "Be On the Lookout" ("BOLO") notification to other law enforcement agencies. R. 161, ll. 21-24. Another

officer testified that he identified blood at the victim's home. R. 164, ll. 22 - 25. He also noticed a bullet hole in the stove, located in the kitchen area. R. 169, ll. 10 - 12.

A crime scene investigator from the South Carolina Law Enforcement Division (SLED) located a fired bullet at the crime scene. R. 179, l. 11 – R. 180, l. 25. He also recovered three shell casings outside the bedroom window. R. 187, l. 24 – R. 188, l. 22. He located an additional bullet fragment in the backyard. R. 189, ll. 8-11. The SLED agent also took a firearm into his possession that evening. R. 189, l. 24 – R. 193, l. 9.

Harold Groves owned a business outside of Walterboro. He was working on December 7, 2009, and noticed a white Buick sitting on the side of the road near his business. He noticed the car at around 8:30 that morning. He was on the phone with 911, when he heard a noise coming from the trunk of the car. Law enforcement officers arrived quickly and discovered the victim in the truck of the car. R. 196, l. 13 – R. 205, l. 7. The victim had penetrating injuries to her abdomen, consistent with being shot. R. 221, ll. 16-17.

Jimmy Roden testified for the prosecution. He knew the victim because she “practically kind of raised” him. R. 228, ll. 16-17. He used to rake leaves for her. Around Thanksgiving, he did some landscaping work for her. R. 229, ll. 11-19. Petitioner was with him when they did the work. R. 231, ll. 2-18. Roden introduced Petitioner to the victim. R. 231, l. 18 – R. 232, l. 7. Roden and Petitioner discussed that the victim had checks in her house. R. 232, l. 13 – R. 233, l. 15.

Nathaniel Harris also testified for the state. He admitted that he participated in these crimes. He testified that Petitioner was with him, but stated that he could not identify him in the courtroom. R. 237, l. 19 – R. 238, l. 22. Harris pleaded guilty to these crimes, and received twenty years in prison. R. 239, ll. 1-9. He testified that it was Petitioner's idea to commit these crimes, and that he had Petitioner's brother, Derrick Aiken, take them to the location in his car. R. 239, l. 23 – R. 240,

l. 15. According to Harris, Petitioner had him cut the telephone line, and then locate a brick to throw through her bedroom window. Harris claimed that he refused to do so, and Petitioner threw the brick himself. R. 241, l. 9 – R. 242, l. 15. Harris also testified that Petitioner possessed the gun and shot the victim. R. 243, ll. 7-17. Harris testified that Petitioner made him go into the house, steal the victim's purse, car keys, and her checkbook. R. 243, l. 18 – R. 244, l. 16. He also testified that Petitioner made the victim climb into the trunk of the car. R. 246, ll. 18-22.

Harris attempted to cash the victim's checks at a local bank the next day. R. 250, ll. 5-9. At the bank, he was arrested by law enforcement officers, and transported to the Colleton County Jail. R. 250, l. 13 – R. 251, l. 24. He gave a confession to law enforcement and implicated Petitioner in these crimes. R. 252, ll. 9-10. On cross-examination, Harris testified that he actually went to the victim's home with Derrick Aiken, Petitioner's brother. R. 259, ll. 2-7.

During his cross-examination of Harris, the following exchange occurred:

Q: All right. Well, look. You're looking at life on burglary; aren't you?

A: (NO RESPONSE).

Q: Aren't you?

A: I've been charged.

Q: Yes or no? Are you looking at life on burglary?

A: That's what it say – that's what it said.

Q: Yes, sir. You're charged with burglary first, correct? You pled guilty to it, correct?

A: (The witness pauses.)

Q: Did you plead guilty in front of Carmen Mullen in this courtroom to burglary first?

A: (The witness pauses.)

Q: Yes or no?

A: No, I didn't plead guilty to burglary first.

Q: Did you plead guilty to assault and battery with intent to kill Mrs. Margaret Gooding, standing here in this courtroom with Judge Carmen Mullen, the lady judge, seated where that judge is today?

A: Yes.

Q: Did you plead guilty to armed robbery?

A: Yes.

Q: And for armed robbery, you could get 10 to 30 years by itself; is that not correct, without—

THE COURT: Just a moment. Yes, sir.

DEP. SOL. THORNTON: Your Honor, it's always—

MR. PLEXICO: Your Honor, could we have a bench conference?

R. 268, l. 3 – R. 269, l. 7.

At the conclusion of trial, the judge stated the following:

THE COURT: Hold on a second, gentlemen. On the record, because I didn't want to stop this trial, I called Mr. Stone, the Solicitor, and Mr. Plexico, to a sidebar before I begin my charge. Mr. Plexico asked for the right, because he rested, to renew his motion for directed verdict at the conclusion of all the evidence, based on the sufficiency of the evidence.

R. 425, ll. 8-14.

At that time, defense counsel also put on the record the sidebar conference that occurred in connection with the cross examination of Harris:

MR. PLEXICO: I believe there was one sidebar we needed to put on the record, when I was questioning Mr. Harris about the—

THE COURT: Yes, sir.

MR. PLEXICO: When I was cross examining Mr. Harris about the amount of time that he could receive on the offenses, and the solicitor objected. At that point in time, we had a sidebar. And I would have objected under Mizelle (sp.) and the confrontation clause to his objection, or justified my questioning. And I just wanted that clearly on the record, Your Honor.

THE COURT: All right. And let me tell you this. I sustained the objection to your soliciting the penalty for the offenses involved in this case. You entered into it by saying "You have a lawyer. You knew how serious this was. And do you know how much the penalty is for burglary or for armed robbery." I let you get away with one question. When you went to the second offense, there was an objection by the solicitor. I sustained the objection. I do not believe the jury should be considering what the maximum penalty is for an offense in their deliberation on the guilt or innocence of the defendant. And for that reason, I sustained the objection, and I want to make sure there is a complete and accurate record of our sidebar.

R. 426, l. 10- 433, l. 10.

The trial court judge erred when he did not allow trial counsel to cross-examine a key state's witness, and co-defendant, about the possible penalties he could receive for his participation in this crime, and when he made a deal with the solicitor's office to testify against Aiken. A defendant has the right to cross-examine a witness concerning bias under the confrontation clause. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). "On cross examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses §560a (1957); see Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 318 (2002). If a defendant establishes he was unfairly prejudiced by the limitation, it is reversible error. Brown, supra. This Court found, in Mizzell, supra, that the trial court judge erred when he did not allow trial counsel to cross-examine a witness charged with the same crimes as the defendant in that case as to the maximum punishment she faced if found guilty of the crime initially charged against her.

In State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), this Court held a trial court improperly limited the scope of defense counsel's cross-examination of a state's witness in circumstances very similar to those presented in Petitioner's case. The witnesses against Gracely faced mandatory minimum sentences significantly longer than the sentences they received in exchange for their cooperation. Id. at 373, 731 S.E.2d at 885. Although the trial judge permitted some questioning regarding the deals made, the judge's limitation "prevented [Gracely] from demonstrating the possible bias rising from these plea deals through an examination reaching the requisite degree of granularity." Id. at 374, 731 S.E.2d at 886. This Court made clear: "The fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury." Id. at 375, 731 S.E.2d at 886.

This Court held the improper limitation was not harmless. The prosecution presented cumulative testimony against Gracely, but presented no physical evidence connecting Gracely to the crimes charged. Thus, the testimony was of paramount importance to the jury, enhancing the necessity that Gracely be permitted to demonstrate any bias on the part of the witnesses. The prosecution's case relied solely and uniformly on the credibility of the witnesses. The issue concerning the mandatory minimum sentences avoided affected the believability of all of the state's witnesses. Id. at 376, 731 S.E.2d at 887. Therefore, this Court held it was impossible to conclude the trial court's error did not contribute to the verdict beyond a reasonable doubt. Id. at 376-377, 731 S.E.2d at 887.

In this case, trial counsel was not allowed to cross-examine a key state's witness, implicated in the same crimes and charged with the same offenses, who clearly made a deal with the state to avoid potential life sentence in exchange for his testimony against Petitioner. "They threw out the burglary charge, and I plead guilty to it." R. 269, ll. 20-21. As in Mizzell and Gracely, the error

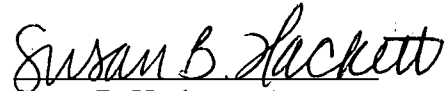
unfairly prejudiced Petitioner-- the denial of meaningful cross-examination in this case outweighed the state's interest in excluding the evidence. Harris offered highly incriminating evidence against Petitioner, and testified that Petitioner engaged in the most egregious aspects of this crime (throwing the brick, shooting the gun, forcing the victim into the trunk). Petitioner was denied his right to fully cross-examine Harris as to the benefits he received by agreeing to testify against him during his trial. Petitioner was denied his right to confront the witnesses against him, and his trial was rendered fundamentally unfair.

Although the Court of Appeals recognized that a defendant's right to cross-examine a witness of potential bias, including possible sentencing, outweighed the need to exclude such evidence based upon the fact that the jury may learn of a defendant's possible sentence, the Court determined the trial court's failure to permit Petitioner to question the state's witness of such was harmless. This was error. The trial court's improper limitation on Petitioner's cross-examination of Harris was not harmless beyond a reasonable doubt. The primary evidence against Petitioner was the testimony of Harris. Therefore, it was incumbent upon to show the jury the potential bias of Harris. It was necessary for Harris to cast as much blame as possible on Petitioner to protect himself and get the best possible deal he could.

CONCLUSION

Petitioner respectfully asks this Court to grant the petition and order full briefing on the issue presented.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of April, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Hampton County

Perry M. Buckner, Circuit Court Judge

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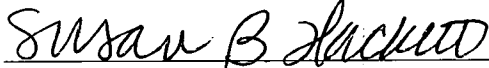
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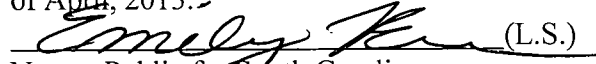
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Stevie Lamont Aiken, # 299883, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, and the S.C. Court of Appeals this 22nd day of April, 2013.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of April, 2013.-


Notary Public for South Carolina
My Commission Expires: November 16, 2022.