

RECEIVED
Apr 26 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Beaufort County

Honorable William H. Seals, Circuit Court Judge

ADRIAN JENKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001660

BRIEF OF PETITIONER

VICTOR R SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED.....1

STATEMENT.....2

STANDARD OF REVIEW4

ARGUMENT

Trial counsel provided ineffective assistance of counsel when she failed to object to the admission of the indictments and sentencing sheets from Petitioner’s prior burglary convictions, used to enhance his current charge to first-degree burglary, where the redactions the trial court made on the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes.....5

Relevant Facts.....5

Discussion.....9

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

<u>Brown v. State</u> , 340 S.C. 590, 533 S.E.2d 308 (2000)	12
<u>Byram v. Ozmint</u> , 339 F.3d 203 (4th Cir. 2003)	12
<u>Jamison v. State</u> , 410 S.C. 456, 765 S.E.2d 123 (2014)	4
<u>Jordan v. State</u> , 406 S.C. 443, 752 S.E.2d 538 (2013)	4
<u>Old Chief v. United States</u> , 519 U.S. 172 (1997)	10
<u>Rollison v. State</u> , 346 S.C. 506, 552 S.E.2d 290 (2001)	12
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016)	4
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018)	4
<u>State v. Benton</u> , 338 S.C. 151, 526 S.E.2d 228 (2000)	6, 11, 13
<u>State v. James</u> , 355 S.C. 25, 583 S.E.2d 745 (2003)	9, 10
<u>State v. Simmons</u> , 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002)	10, 13
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	12, 13
<u>U.S. v. Wacker</u> , 72 F.3d 1453 (10 th Cir. 1995)	11, 13, 14
<u>United States v. Barker</u> , 1 F.3d 957, n. 3 (9 th Cir. 1993)	12
<u>United States v. Brinklow</u> , 560 F.2d 1003 (10 th Cir. 1977)	12

Statutes

18 U.S.C. § 922(g)(1)	11
S.C. Code Ann. § 16-11-311(A)(2)	6

Rules

Rule 404, SCRE	9
----------------------	---

ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when she failed to object to the admission of the indictments and sentencing sheets of Petitioner's prior burglary convictions, used to enhance his current charge to first-degree burglary, where the redactions the trial court made on the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes?

STATEMENT

During the January 2016 term the Beaufort County Grand Jury indicted Petitioner for burglary in the first degree. App. 361 – 362.

On April 18 – 20, 2016, Petitioner proceeded to trial before the Honorable Carmen T. Mullen, and a jury. App. 1. Trasi Campbell represented Petitioner. Id. Hunter Swanson represented the state. Id.

The jury found Petitioner guilty of first-degree burglary. App. 253, l. 24 – 255, l. 1. Petitioner was sentenced to twenty years' imprisonment. App. 266, ll. 17 – 21. On January 27, 2017, Petitioner filed a direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Jenkins, Op. No. 2017-UP-363 (S.C. Ct. App. filed Oct. 4, 2017).

On December 20, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 272 – 278. On March 12, 2019, Petitioner filed an amended PCR application. He alleged, inter alia, trial counsel provided ineffective assistance for failure to object to the admission of indictments and sentencing sheets of Petitioner's prior burglary convictions where the redactions the court ordered were insufficient as they did not prevent the jury from learning highly prejudicial details of the prior crimes. App. 279 – 280. The state filed its return on May 1, 2018. App. 281 – 285.

On April 2, 2019, Petitioner's PCR hearing was held before the Honorable William H. Seals. App. 286. Ashley A. McMahan represented Petitioner. Id. Benjamin Limbaugh represented the state. Id.

On September 14, 2019, Judge Seals filed an order denying Petitioner relief. App. 349 – 360. Judge Seals found trial counsel did try to challenge the admission of the indictments and

sentencing sheets when she, “argued that any prejudicial information in the documents should be redacted” and found that the trial court did make redactions. App. 355 – 356.

On April 8, 2020, a petition for a writ of certiorari, appealing the PCR court’s order of dismissal, was filed for Petitioner. The state filed its return on September 21, 2020. On October 6, 2020, the South Carolina Supreme Court transferred this case to the Court of Appeals. On March 2, 2022, this Court granted certiorari and ordered for further briefing.

This brief follows.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them 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)). We review questions of law 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 Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Trial counsel provided ineffective assistance of counsel when she failed to object to the admission of the indictments and sentencing sheets of Petitioner's prior burglary convictions, used to enhance his current charge to first-degree burglary, where the redactions the trial court made on the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes.

Relevant Facts

On September 17, 2015, George Lawson, the complaining witness, called police when he discovered items were missing from his home. App. 38, l. 20 – 39, l. 8. Lawson alleged Petitioner entered his home without permission and took the missing items. App. 39, l. 16 – 40, l. 1.

Petitioner's friend, Miranda Brock, stayed at Lawson's house¹ "off and on." App. 129, l. 17 – 130, l. 10. At some point, Lawson kicked Brock out, but on September 16, 2015, Brock needed to go back to retrieve some belongings. App. 182, l. 12 – 185, l. 8. Petitioner accompanied Brock to Lawson's to pick up her things because Lawson had a "background for hurting, for fighting women." App. 295, l. 22 – 296, l. 2. When they arrived at Lawson's home, Lawson was packing some speakers into his truck to sell. App. 134, l. 17 – 135, l. 14; App. 157, l. 23 – 158, l. 8. Petitioner offered to sell the speakers because he knew someone who might buy them. App. 132, ll. 1 – 8. Then Brock got her things and they left Lawson's home. App. 182, l. 12 – 185, l. 8.

The next night, September 17, 2015, was when the alleged incident occurred. App. 96, ll. 1 – 2; App. 122, l. 15 – 123, l. 4. Lawson had a surveillance camera set up that night². Id.; Id. The

¹ Both Lawson and Brock admitted to engaging in a romantic relationship as well. App. 129, l. 25 – 130, l. 10; App. 182, l. 10 – 20.

² The date and time in the timestamp on the video was wrong and so the trial court was left taking Lawson's word that this video was taken on the night in question and not on some earlier occasion. App. 164, l. 24 – 165, l. 4.

surveillance video showed Petitioner hopping the fence into Lawson's yard and out of view. App. 124, ll. 2 – 16; App. 146, ll. 20 – 25; App. 326, l. 24 – 328, l. 23. A few moments pass and Petitioner reappears in frame hopping back over the fence out of the yard with some items in his possession. App. 326, l. 24 – 328, l. 23.

Notably, the video did not show Petitioner entering or leaving Lawson's home, it only showed Petitioner hopping the fence then returning over the fence with some items. App. 146, ll. 20 – 25; App. 326, l. 24 – 328, l. 23. None of Petitioner's DNA or fingerprints were found inside Lawson's home or on Lawson's door. App. 164, ll. 20 – 23; App. 165, ll. 17 – 23. Petitioner always maintained that he never went inside the house. App. 294, ll. 6 – 14. Accordingly, the only evidence presented that Petitioner entered the dwelling, and thus committed the purported burglary, was Lawson's testimony that the items were taken from inside his home.

The state was able to charge Petitioner with first-degree burglary by using his prior convictions for burglary as the aggravating factor for enhancement. App. 68, l. 21 – 69, l. 16; See S.C. Code Ann. § 16-11-311(A)(2). Petitioner would not stipulate to the prior burglary convictions being shown to the jury in the guilt phase of his trial. App. 71, l. 24 – 72, l. 20. Instead, trial counsel made a pretrial argument that Petitioner's convictions should not be shown to the jury because they were only relevant to sentencing, but the trial court ultimately accepted the state's argument that the convictions were admissible during the guilt phase of the trial pursuant to State v. Benton³, 338 S.C. 151, 526 S.E.2d 228 (2000). App. 70, l. 10 – 72, l. 20; App. 81, l. 14 – 82, l. 20.

³ The transcript repeatedly refers to "State v. Fenton," but as far as undersigned counsel is aware that was a typographical error. App. 69, ll. 7 – 9; App. 72, ll. 12; App. 210, l. 25 – 211, l. 7. Undersigned counsel believes that the case referred to was State v. Benton because the issue in that case concerned the admissibility of prior burglary convictions for enhancement purposes and no case in South Carolina exists named "State v. Fenton." See Benton, at 155 – 56; 526 S.E.2d at 230 – 31.

The solicitor sought to admit Petitioner's indictments and sentencing sheets as proof of his prior convictions. App. 68, l. 21 – 73, l. 21. Defense counsel objected to their admission because they showed irrelevant and prejudicial information. App. 69, ll. 18 – 25. Judge Mullen expressed skepticism about admitting the sentencing sheets, she stated "I don't think I have ever... given [the jury] a sentencing sheet." App. 70, l. 21 – 71, l. 10. Judge Mullen ordered that the sentencing sheets be redacted before being shown to the jury as proof of Petitioner's prior burglary convictions for enhancement of his current charge. Id.; App. 81, l. 14 – 82, l. 20.

During trial, the solicitor offered the indictments and sentencing sheets from Petitioner's prior burglary convictions as State's Exhibit 1 and 2. App. 100, ll. 12 – 16; Supp. App. 1 – 6. Trial counsel acquiesced to their admission "subject to [her] prior objections." App. 100, ll. 17 – 18. Judge Mullen asked whether the trial court needed to review the exhibits now that they had been redacted, and trial counsel replied, "They're fine." R. 100, ll. 19 – 21. Judge Mullen then admitted into evidence the indictments and sentencing sheets from Petitioner's prior convictions. App. 100, l. 22 – 101, l. 9.

After the redactions, both exhibits still contained highly prejudicial material such that trial counsel should have further objected to their admission. Supp. App. 1 – 6. In State's Exhibit 1, the sentencing sheet showed Petitioner was convicted of second-degree burglary. Supp. App. 1. However, from looking at the indictment the jury learned Petitioner was originally indicted on the more serious charge of first-degree burglary. Supp. App. 2 – 3. This discrepancy may have caused the jury to believe that the state had been merciful to Petitioner for the past burglary convictions and that Petitioner was undeserving of their mercy on his present charges.

Even more prejudicial were the details of the allegations contained in the indictment in State's Exhibit 1 that remained after the redactions. Supp. App. 3. The jury learned the name of

the victim, that the victim was a female, and that Petitioner or his co-defendant caused her physical injury. Id. The court redacted the classification of Petitioner's crime as violent or nonviolent. App. 81, l. 14 – 82, l. 1; Supp. App. 1. However, that redaction was undercut because the jury still saw the prior conviction involved a home invasion where the victim was injured. Id. Trial counsel should have examined the indictments and sentencing sheets after the redactions and further objected to the admission of the indictment so those prejudicial details could also be redacted.

State's Exhibit 2 contained similar prejudicial details. Supp. App. 4 – 6. The jury learned the name of the victim, that she was female, and that the burglary occurred at night. Id. The indictment coupled with the sentencing sheet in State's Exhibit 2 again showed the jury that Petitioner was indicted for first-degree burglary, but only convicted of second-degree burglary. For a second time the jury was given unnecessary information that could have caused them to believe the state had been merciful to Petitioner for his past burglary convictions such that Petitioner was undeserving of their mercy now. Id. All of this information was unfairly prejudicial and trial counsel should have objected to its admission to ensure the jury did not learn of it and convict Petitioner on that impermissible basis.

At PCR, Petitioner testified that the indictments and sentencing sheets admitted to trial were not properly redacted because details of the prior convictions were still readable by the jury. App. 317, ll. 12 – 18. Petitioner explained that trial counsel should have objected because the indictments still showed, after redactions, that he was charged with first-degree burglary but only convicted of second-degree burglary. Id. Trial counsel testified during the PCR hearing that she made a pretrial challenge to the admissibility of the indictments and sentencing sheets. App. 330, l. 20 – 331, l. 2.

The PCR judge denied Petitioner relief ruling that the record showed that trial counsel did challenge the admission of the indictments and sentencing sheets and they were redacted; however, that finding respectfully missed the point. App. 355 – 356. Petitioner’s allegation of ineffective assistance of counsel was that trial counsel should have objected to the admission of the indictments and sentencing sheets *after the redactions were made* because unfairly prejudicial details were still available for the jury to learn. App. 317, ll. 12 – 18. Since this case was a credibility battle between Petitioner and Lawson, that ineffective assistance of counsel was reasonably likely to undermine the outcome of Petitioner’s case such that this Court should vacate his conviction and remand his case for a new trial.

Discussion

Trial counsel provided ineffective assistance of counsel when she failed to object to the admission of the indictments and sentencing sheets of Petitioner’s prior convictions where the court ordered redactions were insufficient because they did not prevent the jury from learning details of the prior convictions that unfairly prejudiced Petitioner.

When the danger of unfair prejudice resulting from the admission of evidence substantially outweighs its probative value, the evidence is not admissible. See Rule 403, SCRE. The detailed information about Petitioner’s prior convictions was unfairly prejudicial because it improperly attacked his character and crossed the line from proving an element of the crime into impermissible propensity evidence. See Rule 404, SCRE; State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003). That unfair prejudice substantially outweighed the probative value of the indictments and sentencing sheets such that they should not have been admitted into evidence until after more extensive redactions, as argued above, were made. Accordingly, trial counsel provided ineffective assistance of counsel when she failed object to their admission for further redactions.

In James, our Supreme Court placed limits on the admission of prior convictions in burglary cases. James at 34 – 35, 583 S.E.2d at 750. The trial court allowed the state to admit seven prior burglary convictions instead of the required two. Id. Our Supreme Court held that admission of so many prior convictions was unfairly prejudicial under Rule 403 and became propensity evidence. Id.

The James Court relied on the United States Supreme Court’s reasoning in Old Chief v. United States, 519 U.S. 172 (1997). In Old Chief, the Court held that when a defendant’s status was an element of an offense, the “issue [was] not whether the concrete *details of the prior crime should come to the jurors’ attention*, but whether the name or general character of that crime [was] to be disclosed.” Id. at 190 (emphasis added). The Court further explained the admission of particular details of the prior conviction was impermissible because the jury only needed to know the defendant’s prior convictions fell within a class of crimes that established the status element of the current charges. Id.

In State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002), this Court held that the admission of Simmons’ prior convictions for second degree burglary did not prejudice him. The state sought to admit Simmons’ prior convictions for burglary to enhance his new charge to first-degree burglary. Id. at 349, 573 S.E.2d at 860. Simmons was willing to stipulate that the alleged crime occurred at nighttime as alternative means for enhancing his charges. Id. at 355, 573 S.E.2d at 863. The Court of Appeals held the state did not have to accept Simmons’ stipulation and the admission of Simmons’ prior convictions was proper because the state did not admit, “detailed, particular information about the prior burglaries and/or house breaking convictions.” Id. at 357, 573 S.E.2d at 864.

Similarly, in State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), our Supreme Court held that the admission of Benton's prior convictions was proper to enhance his charges to first degree burglary. However, the Court warned that to prevent conviction on an improper basis, "particular information regarding the prior crimes should not be admitted." Id. at 156, 526 S.E.2d at 230 – 231.

The Tenth Circuit explained the difference between admitting a prior felony conviction, sterilized of the details of the crime, to prove a defendant's status as a felon and admitting "the nature and underlying circumstances of [the] defendant's [prior] conviction" in U.S. v. Wacker, 72 F.3d 1453 (10th Cir. 1995). In Wacker, the Appellants were charged "in a fifteen-count superseding indictment [for] the commission of multiple drug trafficking and weapons offenses arising out of an extensive marijuana distribution conspiracy." Wacker, at 1459 – 60. One of the Appellants, Lipp, alleged, inter alia, that the admission of his journal entries to prove he had prior felony convictions was an abuse of discretion because the entries contained details of the crimes. Walker, at 1471.

Lipp was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Id. The statute made it "unlawful for any person ... who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition." Id. The government admitted Lipp's journal entries to show that Lipp was a convicted felon which was an essential element to the crime charged. Id.

The Tenth Circuit Court of Appeals recognized it was unnecessary for the state to introduce Lipp's journal entries to prove his status as a convicted felon because the entries contained details of the prior convictions. Wacker, at 1472. Those details were not needed to prove Lipp was convicted of a prior felony because "the details of [Lipp's] prior crime do not make it 'more

probable or less probable' that the [he] is a convicted felon. Rather, this information tends only to color the jury's perception of [Lipp's] character, thereby causing unnecessary prejudice to [him].” Id.; (citing United States v. Barker, 1 F.3d 957, 959 n. 3 (9th Cir. 1993)). Accordingly, the details of a prior conviction should not be admitted to prove a defendant had a prior conviction because they could influence a jury into convicting a defendant on an improper basis such that their admission unfairly prejudices the accused.

The Tenth Circuit also recognized that omitting the details of the prior felony conviction would have in no way hindered the state's ability to prove Lipp's legal status as a prior felon. “Excluding only the nature and circumstances of a [defendant's] prior felony conviction does not prevent the jury from ‘being apprised of the offense charged and all of its attendant elements [including his status as a prior felon]’ nor does it impinge on the government's right to prove all essential elements of its case.” Id.; (quoting United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977) (internal citation omitted). Thus, the probative value of admitting the details of a defendant's prior convictions to prove their status as a convicted felon was nonexistent.

Under Strickland v. Washington, 466 U.S. 668 (1984), when the ineffective assistance of counsel is alleged as a ground for relief in a post-conviction relief action, Petitioner must show that: (1) “his counsel's performance fell below an objective standard of reasonableness,” and (2) “he was prejudiced by counsel's deficient performance.” Rollison v. State, 346 S.C. 506, 552 S.E.2d 290, 292 (2001) (citing Strickland, 466 U.S. 668; Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000)). To succeed on an ineffective assistance of counsel claim, Petitioner must overcome the “presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003) (quoting Strickland, 466 U.S. at 689). Petitioner must also demonstrate that he was prejudiced by trial counsel's deficient

performance in that absent trial counsel's deficient performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

In this case, Petitioner's defense theory was two-fold. Petitioner alleged he was given permission by Lawson to remove the items from the yard and the items he took were sitting outside the home such that Petitioner did not commit burglary because he never entered the dwelling. App. 334, l. 7 – 335, l. 6; App. 339, ll. 16 – 23; App. 342, ll. 14 – 24; App. 214, ll. 6 – 16. However, Lawson denied giving Petitioner permission to take the items and claimed that the items were inside his home. App. 121, ll. 22 – 23; App. 120, l. 11 – 121, l. 6. Thus, Petitioner's trial was a credibility battle between Petitioner and Lawson as to whether Lawson gave Petitioner permission to take the aforementioned items and whether the items were inside the house or in the side yard. App. 121, ll. 22 – 23; App. 214, ll. 6 – 16

The indictments and sentencing sheets admitted in Petitioner's case improperly provided particular information about his prior convictions and put the finger on the scale of the credibility battle between Petitioner and Lawson. Supp. App. 1 – 6. State's Exhibits 1 and 2 showed precisely the type of "particular information" that the decisions in Wacker, Simmons, and Benton prohibited. Id.; See Wacker, at 1472; see also Simmons, at 357, 573 S.E.2d at 864; see also Benton, at 156, 526 S.E.2d at 230 – 231.

Here, the jury learned that Petitioner's prior convictions included a violent home invasion that resulted in the physical injury of the female victim and entering a second female victim's home at night. Supp. App. 1 – 6. Moreover, the jury learned that Petitioner was twice charged with the far more serious crime of first-degree burglary, but both times he was only convicted of second-degree burglary. Id. Admitting those details of Petitioner's prior convictions introduced

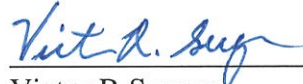
unnecessary and unfair prejudice to Petitioner that substantially outweighed its probative value because the details of the prior convictions had no probative value. See Wacker, at 1472.

This case was a close one. Since Lawson's surveillance video did not show Petitioner entering the dwelling, the only direct evidence Petitioner committed burglary was Lawson's testimony. App. 39, l. 16 – 40, l. 1; App. 164, ll. 20 – 23; App. 165, ll. 17 – 23; App. 146, ll. 20 – 25; App. 326, l. 24 – 328, l. 23. The pretrial guilty plea negotiations also evinced the weakness of the state's case. Initially, the state offered Petitioner a guilty plea agreement with a recommended sentencing range of zero to ten years' imprisonment; however, after the DNA analysis came back without a match to Petitioner the state lowered the range to zero to four years' imprisonment. App. 310, l. 24 – 311, l. 13.

Accordingly, the admission of the severely prejudicial details of Petitioner's prior convictions put a finger on the scale of the credibility battle between Petitioner and Lawson. For these reasons, trial counsel provided ineffective assistance of counsel when she failed to object to the improper admission of the sentencing sheets and indictments because the insufficient redactions allowed the jury to unnecessarily learn unfairly prejudicial details of Petitioner's prior convictions. See Wacker, at 1472. That ineffective assistance of counsel prejudiced Petitioner because there was a reasonable likelihood that absent trial counsel's deficient performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

CONCLUSION

By reason of the forgoing arguments, Petitioner respectfully requests that this Court vacate his conviction and remand his case for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2022.