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Limiting Impeachment When Presenting The Client's Testimony

By Jim Brown

It is not every case that provides the trial lawyer the opportunity to present the testimony of the client. Sometimes, this results from the simple fact that the client is not a good witness; either his account does not help or he has difficulty presenting his account in a persuasive manner. Other times, the possibility of impeachment by the use of prior convictions makes the presentation of client testimony an unreasonable risk, despite any limiting instructions provided by the trial judge. This article focuses on this latter situation, possible impeachment by use of prior convictions, in light of recent decisions from the South Carolina appellate courts and the United States Supreme Court.

General Rule Regarding Impeachment

In the courts of South Carolina, Rule of Evidence 609 governs the use of prior convictions for the purpose of impeaching the credibility of a witness. *SCRE Rule 609*. The rule itself places limitations on the use of prior convictions. First, impeachment is limited to convictions of either a) crimes punishable by more than one year in prison or b) crimes involving dishonesty or false statement. *SCRE Rule 609(a)(1) and (a)(2)*. Secondly, a ten year time limit between the time of the impeachment and the latter of a) the date of conviction or b) release from confinement applies to either type of conviction used under Rule 609(a) unless the court finds the probative value of a conviction outside of the time limit substantially outweighs the prejudicial effect of the admission of this evidence. *SCRE Rule 609(b)*. Thirdly, for convictions within the time limit, a judge must balance the probative value of the evidence against its prejudicial effect. *SCRE Rule 609(a)(1)*. Finally, a pardon, annulment, or certificate of rehabilitation generally prevents the use of a conviction for impeachment purposes. *SCRE Rule 609(c)*.

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Recent Opinions from the Appellate Courts of South Carolina

The recent opinions of the appellate courts of South Carolina give trial lawyers further opportunity to limit the damage from impeachment. In *State v. Colf*, the Supreme Court of South Carolina affirmed the reversal of Mr. Colf's conviction by the South Carolina Court of Appeals. *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). Initially, it should be noted that the impeachment in *Colf* involved the use, under Rule 609(b), of a conviction presumptively too remote under the ten year time limit. In its affirmance, the state Supreme Court adopted a five factor test to be applied by a trial judge when balancing the probative value versus the prejudicial effect of impeachment of a prior crime. *Id.*, at 629. The five factors, adopted from decisions of the federal appellate courts, are:

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., at 627.

The State Supreme Court specifically found the trial judge, in *Colf*, did not adequately conduct the balancing required or articulate the specific factors on which he based his decision. *Id.*, at 626. Further, the state Supreme Court found the trial judge incorrectly believed the similarity between the impeaching crimes and the charges on trial increased the probative nature of the impeachment, when this similarity actually increased the prejudice from the impeachment. *Id.*, at 628.

Following the decision in *Colf*, the State Supreme Court affirmed the grant of post conviction relief to an applicant for failure of the trial counsel to prevent impeachment, by use of prior convictions, based on undue

prejudice outweighing probative value. *Green v. State*, 338, S.C. 248, 527 S.E.2d 98 (2000). In *Green*, the applicant was charged with distribution of crack cocaine and distribution within a half mile of a school. Impeachment was sought by use of prior convictions for possession of crack cocaine and possession of cocaine. Significantly, the prior convictions at issue in *Green* were within the ten year limit under Rule 609. *Id.*

The court analyzed this case with knowledge of the federal standard that prior convictions for crimes of the same or similar nature should only be sparingly admitted. *Green*, at 433. Even considering this federal standard, the court declined "to hold similar prior convictions inadmissible in all cases." *Green*, at 433. However, the court applied the five part test, promulgated in *Colf*, to find that the applicant was prejudiced by the admission of the priors beyond any probativeness because credibility was at issue. *Green*, at 433. The court suggested, in a footnote, that the impeachment would be proper if the government only inquired into the existence of a "prior conviction" and not the nature of the conviction. *Id.*, footnote 5. Finally, the court disagreed with the state that the limiting instruction, given by the trial judge, cured any error in the admission of the prior conviction. *Id.*

Other decisions, of the South Carolina Court of Appeals, have developed this impeachment issue following *Colf* and *Green*. In the first of these cases, *State v. Scriven*, the Court of Appeals found itself unable to review the record concerning the admission of priors for impeachment of the defendant because the trial judge did not articulate his reasons for admission on the record or engage in meaningful analysis of the balancing required. 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000). The Court of Appeals remanded this matter to the trial court for a hearing to conduct the balancing required under the rule. *Scriven*, at 344.

The Court of Appeals next considered the balancing test and articulation of standards in *State v. Mizzell*, 341 S.C. 529, 535 S.E. 134 (Ct. App. 2000). In *Mizzell*, the defendants appealed their convictions, in part, because the trial judge excluded the prior convictions of an accomplice who was testifying on behalf of the state. The Court of Appeals affirmed the convictions by first noting the priors at issue were presumptively inadmissible

because they were seventeen years old at the time of the trial. Further, the Court held that the specific facts relied on by the trial judge need only be articulated, under Rule 609(b), when the priors are *admitted* despite the presumption of staleness under the ten year time limit. *Mizzell*, at 534. By contrast, in *Mizzell*, the trial judge excluded the priors from impeachment. Finally, the Court of Appeals cited parts of the transcript to find that the trial judge engaged in the proper analysis, even though the specific factors were not placed on the record.

Most recently, the Court of Appeals affirmed the conviction of a defendant, over objections concerning the admission of prior convictions for impeachment, in *State v. Dunlap*, Opinion Number 3365, 2001 WL 770347 (Ct. App. 2001). In *Dunlap*, the defendant was convicted of distribution of crack cocaine and impeachment was sought with a prior conviction for distribution of an imitation substance. *Id.* The trial judge ruled, in limine, that the prior conviction was admissible and specifically alluded to *Colf* and *Green*. The trial judge found the admission proper because credibility was a central issue. The Court of Appeals found the analysis proper, even though the trial judge did not expressly articulate every factor in the five part test. Finally,, the Court of Appeals held that the defendant waived his right to appeal this issue because he opened the door to this area of impeachment in his opening argument. Regarding this waiver issue, the Court of Appeals distinguished *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995). (Of note is the fact the South Carolina Supreme Court granted *Dunlap's* petition for review on January 24, 2002.)

Recent decisions of the United States Supreme Court

The United States Supreme Court recently issued a decision which may impact the use of prior convictions for impeachment purposes. In *Ohler v. U.S.*, a five to four majority of the Court affirmed the conviction of a defendant who complained about the introduction of a prior conviction under FRE Rule 609. 120 S.Ct. 1851, 529 U.S. 753, 146 L.Ed.2d 826 (2000). In *Ohler*, the defendant was convicted of importation of marijuana and possession of marijuana with the intent to distribute. She had a prior conviction for possession of

methamphetamine, which was within the ten year time frame of FRE 609(a). *Id.*, at 755. In *Ohler*, the government moved, in limine, for admission of this prior conviction for impeachment purposes. The defendant objected to the admission, but introduced the conviction on direct examination. *Id.*, at 755. Following the conviction, the defendant appealed and the conviction was affirmed by the Ninth Circuit, finding she had waived any objection to the introduction of the prior by her own admission on direct examination. *Id.*, at 755.

The Supreme Court reviewed the *Ohler* case to resolve a split in the federal circuits. *Id.* The majority found the defendant, like the government, must make choices in trial strategy. *Id.*, at 757. Further, the majority relied upon the general principal that a party introducing evidence cannot complain on appeal about the evidence's introduction. *Id.*, at 755. Finally, the majority did not believe anything in FRE Rule 103 or FRE Rule 609 supported the defendant's position. *Id.*

The dissent found the majority ruling to be without any legal support. In fact, the minority found most legal treatises hold otherwise as a matter of law so settled that there is little precedent to be found. Finally, the dissent criticizes the majority holding because it undermines the fairness which FRE Rule 102 states the evidence rules are designed to achieve. *Ohler*, at 763.

The immediate impact of *Ohler* on state practice in South Carolina is unclear. *Ohler* is in conflict with a ruling from the South Carolina Court of Appeals, *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct.App.1995). *Mueller* would appear to control in state court because it provides more protection to the defendant by precluding waiver when a prior is elicited by the defendant on direct examination. (Remember, the waiver in *Dunlap* occurred by the defendant's conceding the prior in the opening statement.) However, *Mueller* predates the Rules of Evidence on the waiver issue and could be overruled if the South Carolina Supreme Court addresses the waiver issue when it reviews *Dunlap*.

Conclusion

Therefore, while impeachment under SCRE Rule 609 places limits upon the use of priors for impeachment,

trial attorneys should use the recent decisions from the appellate courts of South Carolina to further limit the use of these prior convictions. This is especially true when the prior convictions are similar to the charge on trial. However, the *Ohler* decision of the United States Supreme Court may hurt trial lawyers' ability to "draw out the sting" of prior convictions which have been found admissible. Whether *Ohler* will impact interpretations of Rule 609 in South Carolina may be addressed by the South Carolina Supreme Court when it reviews *State v. Dunlap*.

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**Editorial Note: Please see State v. Rollins, Op. No. 3452, Shearouse Adv. Sheet 5, filed Feb. 25, 2002 (Court of Appeals) for further development of the law in this area.*