

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

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D. Garrison Hill, Circuit Court Judge

JUL 17 2013

S.C. Supreme Court

DONNIE NELSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213233

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to object to improper bolstering by the solicitor during closing arguments after he gave his personal opinion boasting of Jarvis Clement's credibility as a state's witness because this constituted impermissible vouching, which was especially prejudicial since the state's case hinged solely on Clement's testimony at trial.

STATEMENT

Petitioner Donnie Nelson was convicted of armed robbery, conspiracy, and two counts of possession of a weapon during the commission of a violent crime during the January 2006 term of the Greenville County General Sessions before Judge G. Edward Welmaker. Judge Welmaker dismissed one count of possession of a weapon during the commission of a violent crime, and then sentenced petitioner to imprisonment of an aggregate period of seventeen years. App. 1-388. Petitioner was represented by Dorothy Manigault at trial. Petitioner appealed.

The issue raised on direct appeal addressed the admissibility of a prior statement made by a key witness (Jarvis Clement) in the case. App. 390-403. Katherine Hudgins represented petitioner on appeal. After briefing by both sides, petitioner's convictions and sentences were affirmed by the South Carolina Court of Appeals. See State v. Nelson, Opinion No. 4423 (S.C. Ct. App. filed July 8, 2008). App. 419-424. On February 5, 2010, the South Carolina Supreme Court denied petitioner's petition for a writ of certiorari filed in the appeal. App. 448; App. 425-447.

On July 27, 2010, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. Petitioner was present at the hearing and represented by W. Cory Hughes. App. 449-455. The respondent filed a return dated December 20, 2010, requesting that a hearing be held in the case. App. 456-459.

A PCR hearing was held on February 29, 2012, at the Greenville County Courthouse before Judge D. Garrison Hill. App. 460 – 486. Two issues were raised by petitioner at the PCR hearing. Petitioner alleged that appellate counsel was ineffective in filing an incomplete record in the appeal to the extent that relevant portions of the trial transcript that were supportive of the issue raised on appeal were excluded from the records filed in the case. Also, petitioner alleged that trial counsel was ineffective in failing to object to the solicitor's improper bolstering of key witness Jarvis

Clement by vouching for Clement's credibility as a state's witness based on his (solicitor's) personal opinions of Clement. App. 463, lines 1 – 6.

On June 21, 2012, Judge Hill issued an order of dismissal denying petitioner's allegations of ineffective assistance of trial counsel and appellate counsel in the case. App. 559-564.

Petitioner appealed Judge Hill's order of dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to improper bolstering by the solicitor during closing arguments after he gave his personal opinion boasting of Jarvis Clement's credibility as a state's witness because this constituted impermissible vouching, which was especially prejudicial since the state's case hinged solely on Clement's testimony at trial.

The state's theory of the case was that Laurence Waller drove petitioner, Lawrence Clovis, and Jarvis Clement to Grady Blassingame's Barbershop and that petitioner and Clovis went in and committed robbery while inside the barbershop. Waller, Clovis, and petitioner were all tried jointly. Clement was the only co-defendant who testified as a state's witness during the joint trial. The remaining co-defendants, including petitioner, did not testify at trial.

At trial, Grady Blassingame testified that around 6:00 pm on November 6, 2004, two men entered his barbershop located on Anderson Road in Greenville, South Carolina, in a very boisterous manner, and that he heard a gunshot fired shortly thereafter. One of the two men approached and told him (Blassingame) to surrender the money and the jewelry. Blassingame had \$600.00 in cash and jewelry (bracelet, rings and a Rolex watch) on him at that time. The two perpetrators fled thereafter. Tr. 104, l. 10-p. 119, l. 13. Blassingame testified that he recognized one of the perpetrators as Laurence Waller, who was a former customer. App. 119, l. 19-21; App. 116, l. 10-19.

State's witness Jarvis Clement testified that he, Waller, and Clovis were in Waller's vehicle (Waller was driving) riding around downtown Greenville on the day in question when they drove to Blassingame's Barbershop. Clement stated that petitioner and Clovis exited the vehicle and walked into the barbershop, and that shortly thereafter, petitioner and Clovis made their exit from the barbershop. Clement added that afterwards they went to Waller's house to divvy up the spoils. App. 152, l.22-p. 181, l.25.

During the PCR hearing, petitioner testified in effect that some of the solicitor's statements at closing included his personal opinions about why Clement would not lie, which was tantamount to improper vouching and bolstering of Clement as a witness and his testimony. Petitioner explained that "if [the jury] did believe Mr. Clement [then] I (petitioner) would have walked out (acquitted) on that same day". App. 483, l.25-p. 485, l. 5.

Trial counsel testified at the PCR hearing and admitted that the entire case hinged on Clement's testimony and his credibility as a witness (App. 478, l. 10-24), but added that she (trial counsel) did not object to the solicitor's personal opinions, vouching and improper bolstering that occurred during the solicitor's closing argument because she found no errors in the same. App. 479, l. 16-p. 481, l.16.

The portion of the solicitor's argument in controversy follows:

Mr. Moyer: The defense is going to get up here, I'm quite sure, and tell you how bad a guy Jarvis Clement is... a liar; he's a crook; he's an armed robber; he's a robber; he's a kidnapper...It's true.

So you can have two reactions to this. You can have one hand say, well, we know Jarvis Clement – we know Jarvis Clement wasn't a very polished speaker and we know Jarvis Clement committed some armed robberies and had a gun, did this horrible thing, so, you know, forget it; or you can have what I argue to you is a more mature response to that, and that would be this, which is just to say let's think about it. Let's think about it for a

minute. Can we believe what he said? Is it logical? And I can argue to you for several reasons that you can.

And first of all, the first reason is essentially what was used against him, and that is because he is trying to help himself...He's looking at -- you know, he has a lot of time hanging over his head....Why does he care who the other people are who were involved in this crime with him? What does it matter to him. He did the hard part. He did the hard part when he put himself in jail for a long time. Make no mistake about that.

Think about the consistencies of his statement. And, once again...And I would argue this to you, ladies and gentlemen. The inconsistencies in his statement actually argue to you the opposite of what the defense would say, would argue to you that he's telling the truth. Why is that? Why is that? You heard -- he was questioned about how he met the prosecution, how we know that he talked to the officers numerous times. He's going to make up a story? What's his story going to be? It's going to be consistent. If he's lying, there's not going to be anything wrong with him. He's going to think through it.

App. 282, l. 5-11 and App. 283, l. 10-22; App. 284, l. 22-p. 284, l. 5; App 284, lines 9-10; App. 284, lines 18-20; App. 285, l. 3-4; App. 286, l. 11-12; App. 286, l. 20 – p. 287, l. 4.

In the order of dismissal handed down in the case, the PCR judge ruled that the petitioner failed to meet his burden of proving that the trial counsel should have objected during the state's closing argument because the record did not establish that the solicitor vouched for Clement at closing. App. 562.

A prosecutor cannot vouch for a witness' credibility. State v. Shuler, 344 S.C. 604, 630 S.E.2d 805 (2001). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit assurances of a witness' veracity or when the prosecutor implicitly vouches for a witness' veracity by indicating information not presented by the jury supports the testimony. State v. Kelly, 343 S.C. 350; 540 S.C. 2nd 851 (2001). The Kelly Court reversed where the solicitor queried a witness on his (solicitor's) standard of testifying

truthfully at trial and in relation to a plea agreement, which in turn suggested that the solicitor believed the witness was telling the truth, and this meant that the witness' testimony "carried with it the imprimatur of the government." The Kelly Court held that this type of improper bolstering might have "induced the jury to trust the state's judgment about the witness." See also Gilchrist v. State, 350 S.C. 221; 565 S.C. 2nd 281 (2002), where the Court reversed where the solicitor improperly vouched for the witness' credibility by praising one of the perpetrators for coming "clean" and in effect "cleansing" his soul by admitting his role of the armed robbery of the victim in the case. In Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004), the Court held that despite the fact that defense counsel opened the door on the question of the why only one of the two officers who found drugs at the scene were called to testify at trial; nonetheless, the solicitor erred in vouching during closing arguments for the absent officer by assuring the jury that this officer was not a liar and would have stated the same facts the officer who did testify at trial because this was improper bolstering that prejudiced petitioner's case since the evidence was not overwhelming as the two officers' drug findings during the search constituted the only evidence against that defendant.

The case at bar is similar to Vaughn in that the facts against petitioner were not overwhelming and as a result, the instant improper vouching was sufficiently prejudicial to violate petitioner's right to a fair trial. In the present case, the solicitor clearly indicated personally why Clement was believable to him and went on to explain why he (solicitor) believed Clement was not lying at trial. The reason was that Clement faced so many charges and such extended and lengthy sentences that it would not profit him to lie to the jury as lying would not alter his fate significantly. Undoubtedly, the solicitor's comments in question constituted improper vouching that resulted in improper bolstering.

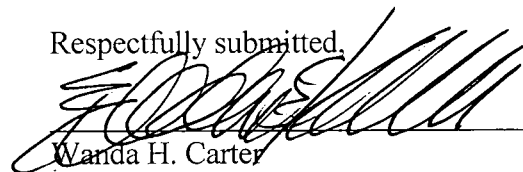
Counsel's error in failing to object to the solicitor's vouching in question was particularly prejudicial to petitioner's defense of not guilty because the state's case hinged solely on Clement's testimony. For example, no statements were admitted into evidence by petitioner or the remaining codefendants. Additionally, there was no forensic evidence admitted at trial against petitioner. Finally, Blassingame did not identify petitioner as a perpetrator, and no other co-defendant testified fingering petitioner as a perpetrator. Clement was the inside man who could (and did) identify petitioner as a perpetrator in the case. Thus, Clement's testimony and credibility as a witness were central and key to the state's case because without the same, the state's charges against petitioner could not be proved. Hence, the reason for the solicitor's vouching and improper bolstering.

Trial counsel's error in failing to object to the improper portions of the solicitor's closing argument at issue constituted deficient legal representation well below the level of competence required of criminal attorneys in violation of the Sixth Amendment to the United States Constitution. Petitioner was prejudiced as a result of trial counsel's incompetence because but for the error in question, a reasonable probability exists that petitioner's trial might have ended differently.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
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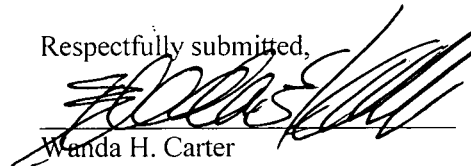
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donnie Raymundo Nelson states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 29, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Donnie Raymundo Nelson.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of July, 2013

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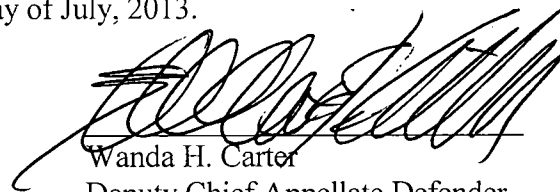
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RESPONDENT

Appellate Case No. 2012-213233

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Donnie Raymundo Nelson, #313456, at Kershaw Correctional Institution this 17th day of July, 2013.

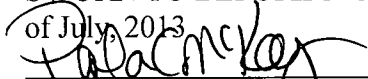


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day

of July 2013

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.