ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Jasper County

D. Craig Brown, Circuit Court Judge

SYLVESTER TOOMER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-192933

BRIEF OF PETITIONER

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[1] 388 S.C. 447, 698 S.E. 2d 561 (2010).
[2] 314 S.C. 257, 442 S.E. 2d 611 (1994).
[3] 255 S.C. 406, 179 S.E. 2d 211 (1971).

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing the solicitor to argue at closing that appellant's act of grabbing the steering wheel from the driver while the vehicle was in motion was comparable to the conduct of the pilot who flew a plane into the NYC twin towers on 9/11 because this argument has been condemned in Vasquez v. State[4] and was so inflammatory that per the Court's holdings in Toyota v. Lynch,[5] and South Carolina State Highway Department v. Nasim,[6] such an argument yielded the type of "clear prejudice" that would warrant the grant of a new trial despite the absence of a contemporaneous objection to the same.

[4] 388 S.C. 447, 698 S.E. 2d 561 (2010).
[5] 314 S.C. 237, 442 S.E. 2d 611 (1994).
[6] 255 S.C. 406, 179 S.E. 2d 211 (1971).

STATEMENT OF THE CASE

Appellant Sylvester Toomer was tried by jury on two counts of assault and battery with intent to kill during the August 2007 term of the Jasper County General Sessions Court before Judge Perry M. Buckner. Appellant was found guilty as charged and sentenced to imprisonment for a period of two concurrent twenty-year sentences, suspended upon the service of ten years, and five years probation. App. 1-232. John D. Bryan represented appellant at trial. Appellant did not enjoy the benefit of a direct appeal in the case.

On June 5, 2008, appellant filed a PCR application at the Jasper County Office of the Clerk of Court. App. 234-240. The respondent filed a return dated March 18, 2009, requesting that a hearing be held in the case. App. 241-244. A supplemental PCR application was filed on February 9, 2010. App. 245-247.

A PCR hearing was held on April 20, 2011, at the Jasper County Courthouse before Judge D. Craig Brown. Brian D. McDaniel represented appellant at the PCR hearing. App. 248-272. On May 9, 2011, Judge Brown issued an order of dismissal in the case. App. 274-281.

Appellant appealed and filed a petition for writ of certiorari on March 23, 2012. On April 16, 2013, this Court issued an order granting appellant's request for a belated direct appeal in the case. This brief of appellant follows.

ARGUMENT

The trial judge erred in allowing the solicitor to argue at closing that appellant's act of grabbing the steering wheel from the driver while the vehicle was in motion was comparable to the conduct of the pilot who flew a plane into the NYC twin towers on 9/11 because this argument was condemned in Vasquez v. State[7] and was so inflammatory that per the Court's holdings in Toyota v. Lynch,[8] and South Carolina State Highway Department v. Nasim,[9] such an argument yielded the type of "clear prejudice" that would warrant the grant of a new trial despite the absence of a contemporaneous objection to the same.

The state alleged that appellant injured two males in a vehicle rollover when he grabbed the steering wheel from the driver of the vehicle while it was moving on the highway. The vehicle then flipped over. Appellant and two other men were inside the vehicle at that time. App. 186, l. 12 – p. 187, l. 6.

At trial, Officer Edwin Gibson testified that he was on duty on October 21, 2006, when he was dispatched to an automobile (SUV – Ford Explorer) rollover accident that had occurred on I-95 South at Exit 21 in Jasper County. Officer Gibson stated that appellant, who was the back seat passenger, and Rashid Grayson, who was the front seat passenger, were able to extricate themselves from the automobile, but that driver Ead Johnson had to be pulled out and was thereafter transported to the hospital for his injuries. App. 110, l. 12 – p. 116, l. 12.

Passenger Rashid Grayson testified that he and appellant were riding in the vehicle that Ead Johnson drove when the automobile rolled over. Grayson described the event as follows:

> As we was (sic) traveling, [petitioner] started trying to talk to Ead Johnson. But ain't nobody paying no attention. So he reached from the back seat behind the driver and grabbed the wheel and snatch[ed] it, and that's when we flipped.

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[7] 388 S.C. 447, 698 S.E. 2d 561 (2010).
[8] 314 S.C. 257, 442 S.E. 2d 611 (1994).
[9] 255 S.C. 406, 179 S.E. 2d 211 (1971).

App. 125, ll. 18-22.

Driver Ead Johnson testified at trial and described the event as follows:

> And that's when [appellant] - - you know, we was just - - we was all in the car and, you know, the radio was playing so...and that's when....he just leaned forward and ....and said...you know I can kill all of us now, you know. And all of a sudden, he just grabbed the steering wheel...[and] that was enough to turn that truck, van, right on over.

App. 141, l. 15 – p. 142, l. 13.

The solicitor's closing argument follows:

> The other thing about that is - - I can't conceive of why somebody would have done this. <u>But the fact that he was willing to hurt himself in order to hurt others is not a defense.... It seems like to me on September morning I heard about some fellows that drove some airplanes into a building up around New York somewhere and hurt and killed a bunch of people.</u> <u>Does that make them innocent? Does that make the people, drivers, steering that airplane innocent? Of course not. They're just not around to prosecute.</u> But if they were, they would certainly be guilty of a crime.

App. 183, l. 23 – p. 184, l. 9.

There was no objection made to the solicitor's 911 argument at trial. However, per the Court's holdings in <u>Toyota v. Florence</u>, <u>supra</u>, and <u>South Carolina State Highway Department v. Hasin</u>, <u>supra</u>, some closing arguments are so "vicious" and "inflammatory" that the resulting flagrant error that results warrants a new trial "even in the absence of a contemporaneous objection." In <u>Toyota of Florence, Inc. v. Lynch</u>, <u>supra</u>, where there were depictions of the defendants in posters identifying them with Japanese people presented during closing arguments, and the Court reversed and held that this portrayal was "vicious," "inflammatory," and "outrageous," and served only to invoke racial prejudice. Compare <u>South Carolina State Highway Department v. Nasim</u>, <u>supra</u>, where the landowner's counsel argued at closing that the highway department's witness, who assigned a land value to the landowner's condemned property, was a

"quizzling quivaler" like the "quizzlers" back in WWII who were "back in Germany and France [that] sided up with the enemy," and the Court reversed because the "quizzler" closing argument was so "vicious" and "the likelihood of prejudice so strong that...the highway department did not receive a fair and impartial trial."

Note further the Court's reversal in the case of Vasquez v. State, supra, where an identical 911 closing argument was made and where there was no objection to the 911 argument at trial. In Vasquez, the defendant was convicted of killing two employees at a Burger King where he (defendant) worked prior to his termination from there, and the Court remanded the case for a new sentencing hearing because the solicitor's closing argument improperly characterized the defendant, who was a Muslim, as a "domestic terrorist," and implied that there was a direct correlation between the defendant's conduct and the conduct of the 9/11 actors. The Vasquez court held that the 9/11 characterization carried a negative connotation and improperly evoked religious prejudice, which in turn inflamed the passions and prejudices of the jury enough to infect the trial with sufficient unfairness to have denied the defendant a fair trial.

Likewise, in the case at bar, the solicitor's argument infected appellant's trial with enough unfairness as to deny him the right to a fair trial. The solicitor's comparison of the catastrophe and tragedy of 911 and the high death toll (over 3,000 people) of 911 to a case like this, which ended in no deaths, and had no religious, or unpatriotic, or terroristic overtones contained therein, was beyond outrageous. This case did not rise to the egregious level of the criminal acts of 911. Moreover, not only was the solicitor's 911 comparison inaccurate and prejudicial, but the suggestion that the jurors could link the two events and then convict appellant to somehow compensate for the sins of the 911 pilot, who could not be convicted, exacerbated the prejudice exponentially because the jury was given permission to vicariously strike a blow against terrorism by convicting appellant. Moreover, it cannot be assumed that the jurors would have even thought of such an analogy on their own. Finally, it cannot be presumed that this conjured-up negative

portrayal of appellant via the improper 9/11 comment did not contribute to the jury verdict in this case. Thus, the solicitor's inflammatory closing remarks were not harmless. Error is not harmless if it does contribute to the jury verdict. State v. Martin, --- S.C. ---, 742 S.E.2d 42 (2013).

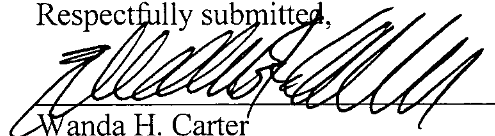
As a rule, a solicitor's closing argument must not appeal to the jurors' personal biases or arouse their passions or prejudices, and its content should stay within the record and reasonable inferences of the evidence presented. Humphries v. State, 351 SC 362, 570 S.E.2d 160 92002). Solicitors are bound to the rules of fairness in their closing arguments. State v. Linder, 276 S.C. 304, 278 S.E. 2d 335 (1981). A reversal is required if the solicitor's comments infect the trial with enough unfairness as to make the resulting conviction a denial of due process. Donnelley v. DeChristoforo, 416 U.S. 637 (1974).

The lower court erred in allowing the solicitor to make the inflammatory 911 argument in question, and the result was the denial of appellant's right to due process at trial as guaranteed under the Fourteenth Amendment to the United States Constitution and article 1, §3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant requests that the Court reverse his convictions and sentences and remand the case to the lower court for a new proceeding.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of June, 2013.

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V.

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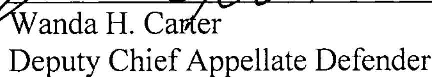
RESPONDENT

CERTIFICATE OF SERVICE

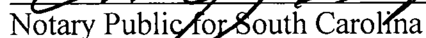
The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Sylvester Toomer, #323392, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, 14th day of June, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of June, 2013.


(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.