

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jun 06 2024

S.C. SUPREME COURT

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Certiorari to Newberry County

Honorable Daniel McLeod Coble, Circuit Court Judge
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STERLING MAYBIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001760
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
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ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective assistance where counsel failed to object to the improper comments made by the solicitor during opening statements because counsel incorrectly believed the statements were not objectionable?

STATEMENT OF THE CASE

In early 2019 Ms. Bessie Mathis and Mr. Larry Hazel noticed various pieces of lawn equipment and tools missing from their respective properties in Newberry, SC. Both Mathis and Hazel installed cameras on their properties to monitor the open-air sheds where their personal property was stored. On April 24, 2019, police received calls from both Mathis and Hazel reporting their cameras had captured an individual removing items from their property. App. 55, l. 12-App. 56, l. 24; App. 73, l. 25-App. 74, l. 8; App. 78, l. 22-App. 80, l. 1. The cameras captured a slender black male looking through the items under the open-air sheds then leaving the properties with various tools and lawn equipment. The man was wearing a red colored skull cap, a burgundy-colored hoodie/jacket over a white t-shirt, navy blue cargo pants, dark tennis shoes, and light-colored gloves. He was carrying a backpack. App. 102, l. 20-App. 103, l. 10.

Mathis reported a chainsaw, weed eaters, a grinder, and other various tools taken from her property. The security camera on her property captured a black male leaving with a weed eater on April 24. App. 55, ll. 12-23; App. 61, ll. 1-15. Mathis estimated the total value of the items taken from her property was over \$2,000.00. App. 64, ll. 15-20. Hazel reported chainsaws, a push weed eater, impact drivers and sockets, a chisel hammer, and various other tools missing from his property. The security camera on his property captured a black male leaving with lawn equipment and tools on April 23 and 24. Hazel estimated the value of the equipment and tools taken from his property was over \$2,000.00. App. 97, l. 9-App. 99, l. 22.

Police forwarded still shots from the surveillance cameras to other members of the City of Newberry police department. App. 103, l. 19-App. 104, l. 18. Detective Allison Moore, Captain Kevin Goodman, and Chief Roy McClurkin all identified the man in the surveillance videos as Petitioner Sterling Maybin. App. 121, l. 14-App. 122, l. 10; App. 129, l. 11-App. 130,

l. 9; App. 131, l. 25-App. 132, l. 22. Petitioner was arrested that same day wearing clothing similar to the clothing worn by the individual on the surveillance videos. App. 109, l. 17-115, l. 19. He was charge with three counts of enhanced petit larceny. App. 124, ll. 7-13.

Petitioner was indicted during the July 2019 term of the Newberry County grand jury for three counts of enhanced petit larceny and two counts of second-degree burglary, violent. App. 201-210. The State, represented by Dale Scott and Taylor Daniel, called the case to trial on August 26-28, 2019, before the Honorable Donald B. Hocker and a jury. Petitioner was represented by Charles Verner. App. 1.

Shortly after beginning his opening statement the solicitor said,

And you might be familiar with this process, but if you're not, a crime was committed, a crime was reported to the police. The police got out there and they investigate[,] and they develop a suspect[,] and they make an arrest. So[,] from the arrest, all the information and evidence has been forwarded to our office, to the Solicitor's Office, and our job is then to decide if there's enough evidence to proceed with a trial.

App. 40, ll. 17-24. After discussing the evidence in the case, the solicitor concluded his opening remarks by stating,

We're not asking you to pass judgment on anybody's character. We're just asking you to make a decision based on the evidence. We have no agenda here. It's nothing political. It's just a crime has been committed and we feel that we have enough evidence that will leave you firmly convinced of his guilt.

App. 47, ll. 15-20.

Counsel Verner did not object to any portion of the solicitor's opening statement. During Counsel Verner's opening statement, the defense conceded that Petitioner was guilty of the larcenies. App. 48, ll. 10-14. Counsel Verner argued that the law did not support the charges of burglary and the jury should find Petitioner not guilty on those charges. App. 48-49. He told the jury they would have to determine if the open-air sheds where the property was stored

constituted a building for the purposes of the burglary statute. App. 50-51. After a three-day trial Petitioner was found guilty as indicted. App. 186, l. 19-App. 187, l. 12. The circuit court sentenced Petitioner to ten years incarceration on each enhanced larceny, with two of the three charges to run consecutively, and eight years incarceration on each burglary charge to run concurrently to his other sentences. App. 198, ll. 19-24; App. 211-215.

Petitioner timely appealed his convictions and sentences. On direct appeal he argued that the circuit court erred in failing to direct a verdict of acquittal because the structures involved in the case did not meet the statutory definition of a building under the burglary statute. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Maybin, 2021-UP-358 (Filed October 20, 2021). Petitioner filed an application for post-conviction relief on November 5, 2021. App. 216-222. The State filed a return and motion for a more definite statement on February 9, 2022. App. 223-234. Petitioner filed two *pro se* amendments to his PCR application. App. 235-248. On May 22, 2023, PCR Counsel Michael Lifsey filed an amended application raising nine grounds of ineffective assistance of counsel. App. 249-253.

An evidentiary hearing was convened on July 17, 2023, before the Honorable Daniel Coble. The State was represented by Zachary Jones. Petitioner was represented by Counsel Lifsey. App. 254. Regarding the solicitor's opening statement, Petitioner testified that Counsel Verner did not object to the comments and "just let him [the solicitor] do what he wanted to do to me." App. 273, ll. 5-10. Counsel Verner admitted that he did not object to the solicitor's opening statement. He confirmed he was familiar with the law that cautions solicitors not to make statements regarding the State's preliminary determination of the facts and evidence. When asked why he did not object to the solicitor's opening statement he testified,

And I guess my answer would be, I did not feel that it was significant enough in the text and the scope of his opening statement. I routinely object to opening statements, particularly that solicitor at the time, but the openings are a little bit broader than, and I don't, like, I heard you read the statement, I don't think it's an egregious violation, I'm not even sure it's a violation at all because the solicitors prosecute the case. So, I heard the statement, I disagree that it would be an objectionable opening argument, maybe it comes closer than I believe it does and other attorneys can look at it differently, but --

I understand your point that the solicitor is getting close to saying that he's looked at the evidence and that it's compelling and the jury can be satisfied that he's looked at it and confirmed the guilt of the Defendant.

I don't think it's objectionable at all, I might be mistaken on that, just from hearing it from hindsight, that's not a statement I would object to. I think it still preserves the role of the jury where the solicitor, in my opinion, is saying we believe we've got a prima facie case to present to you. The, particularly with the Judge's closing, I don't think that's objectionable, I might be wrong, but I stand by that. But I would not have objected to it, I didn't think it was wrong and chose not to object. I don't think that comes close enough to a violation.

App. 290, l. 2-App. 292, l. 14.

The PCR court took the matter under advisement after hearing the arguments of the parties. App. 308, l. 23-App. 309, l. 4. An order of dismissal was filed on October 20, 2023. App. 311-324. The PCR court found that Petitioner could not show any prejudice due to the overwhelming evidence of guilt in the case against him. That evidence included the surveillance videos capturing Petitioner's face and showing Petitioner committing the thefts in the clothing that he was ultimately arrested in, as well as Petitioner's admission that he was the perpetrator. App. 317. Additionally, the PCR court found that counsel was not ineffective for failing to object during the solicitor's opening statement because the solicitor's comments were neither objectionable nor prejudicial. App. 322.

ARGUMENT

The PCR court erred in finding counsel provided effective assistance where counsel failed to object to the improper comments made by the solicitor during opening statements because counsel incorrectly believed the statements were not objectionable.

“The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented.” State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986). “The solicitor is permitted in opening statement to outline the facts the [S]tate intends to prove.” Id. However, the appellate courts of this State have “repeatedly condemned [] arguments that lessen the jury's sense of responsibility by reference to preliminary determinations of the facts.” State v. Thomas, 287 S.C. 411, 412, 339 S.E.2d 129, 129 (1986) *citing* Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981); *See Also* Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019). “These statements to the jury are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts.” Thomas at 412-413, 339 S.E. 2d at 129. “Jurors are simply not to consider the opinions of neighbors, officials or even other juries.” State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686 (1982).

On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt.” Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (internal citations omitted). “Improper comments do not automatically require reversal if they are not

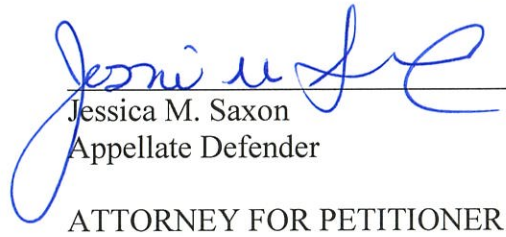
prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Id. “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

Contrary to Counsel Verner’s belief, the solicitor’s opening statement was improper. The solicitor’s statement was a classic example of an argument that referenced the State’s preliminary determination of the facts in the case. The solicitor’s comments improperly suggested to the jury that the State would not have brought the charges to trial if there was not adequate evidence of Petitioner’s guilt. These types of arguments have repeatedly been held improper because they inject the solicitor’s personal opinion into the jury deliberations and lessen the jury’s sense of responsibility to determine the facts from the evidence presented at trial. Counsel Verner should have objected to the State’s opening.

Our Supreme Court has held that trial counsel’s decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). The failure of Counsel Verner to object to the improper comments was not excused by a valid trial strategy. In fact, Counsel Verner failed to object because he did not believe the comments were improper. Ignorance of the law can not be considered a valid on sound trial strategy. The failure to object was deficient performance that was not excused by a valid trial strategy.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the petition for writ of certiorari to allow full briefing of this issue.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of June, 2024.

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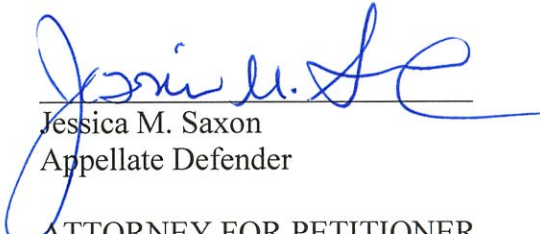
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sterling Maybin states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Daniel McLeod Coble, which was held on July 17, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Sterling Maybin.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of June, 2024.

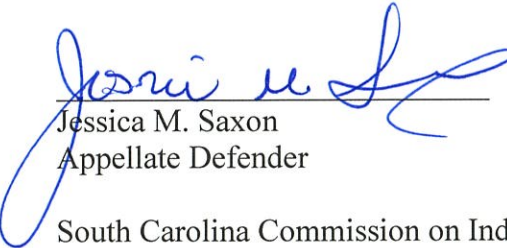
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 6th day of June, 2024.