STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lee County

William Jeffrey Young, Circuit Court Judge

TYRONE SINGLETARY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213528

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

In violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution, trial counsel failed to object to and/or move for a mistrial based upon the solicitor's improper closing argument where the solicitor informed the jury that the co-defendant's statement to a television report implicated the co-defendant and others in the hostage-taking.

STATEMENT

On September 30, 2004, a Lee County grand jury indicted Petitioner for rioting, two counts of taking of a hostage, assaulting a correctional officer, carrying or concealing a weapon by an inmate of a correctional institution, and inciting a riot. App. 1014 – 1016. Petitioner and his co-defendant, Jacob Lynch, proceeded to trial on November 29, 2005 before the Honorable Thomas W. Cooper, Jr. and a jury. Paul Fata represented the state, Clifford Scott represented Lynch, and Brian Doby represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 913, line 18 – App. 914, line 5. The state had served notice its intent to seek life without the possibility of parole (LWOP) as a sentence pursuant to S.C. Code Ann. § 17 – 25 – 45. App. 925, lines 14 – 17. Judge Cooper sentenced Petitioner to two sentences of LWOP for the two counts of taking of a hostage. Additionally, Judge Cooper sentenced Petitioner to ten years' imprisonment for rioting, five years' imprisonment for assaulting a correctional officer, ten years' imprisonment for carrying or concealing a weapon by an inmate of a correctional facility, and ten years' imprisonment for inciting a riot. Judge Cooper ordered the sentences imposed that day to be served consecutively to Petitioner's current sentences, but concurrently to all other sentences imposed that day. App. 926, line 1 - App. 927, line 12; App. 1017 – 1022.

Petitioner filed a timely notice of appeal, which was perfected by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Eleanor Duffy Cleary represented Petitioner on his direct appeal. The Court of Appeals dismissed petitioner's appeal on September 5, 2008 in an unpublished opinion. State v. Singletary, 2008-UP-506 (S.C. Ct. App. filed Sept. 5, 2008).

Petitioner filed a post-conviction relief (PCR) application on May 4, 2009. App. 943 – 952. The matter proceeded to a hearing on September 20, 2012 before the Honorable W. Jeffrey Young. Louis Lang represented Petitioner, and Megan Harrigan represented the state. App. 958. By order

dated November 1, 2012, Judge Young denied Petitioner relief from his convictions and sentences. App. 1005 – 1012.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution, trial counsel failed to object to and/or move for a mistrial based upon the solicitor's improper closing argument where the solicitor informed the jury that the co-defendant's statement to a television report implicated the co-defendant and others in the hostage-taking.

Relevant facts

Evidence from the trial

Several witnesses testified that on October 29, 2003, Petitioner an inmate at Lee Correctional, along with co-defendant Jacob Lynch, an inmate as well, gained control of their housing unit, the Chesterfield Unit, within Lee Correctional Institution. Correctional Officers Cotton and Dozier were working at the time of the incident. App. 378, lines 2-14; App. 378, line 19 – App. 379, line 2; App. 379, lines 10-20; App. 380, lines 7-11; App. 382, line 10 – App. 383, line 6. One officer described the scene as total chaos with inmates "running around with sticks, shanks, or anything else they could get to break something with." App. 357, lines 17-21. He characterized the incident as a riot. App. 357, line 22 – App. 358, line 1. Witnesses testified that Lynch and Petitioner stabbed Officer Cotton with a shank. App. 323, line 25 - App. 324, lines 1-13; p. 342, lines 2-5; App. 387, lines 1-20; App. 389, lines 14-19; R. 392, lines 10-12; App. 393, lines 7-8; App. 504, line 17 – App. 505, line 5; App. 520 line 20 – App. 521, line 4; App. 542, lines 1-11. Cotton testified that Petitioner stated that he did not really want to hurt Cotton; he only wanted to be heard. App. 397, lines 7-10. Cotton admitted that Petitioner was trying to get Lynch to release Cotton. App. 408, lines 12-23.

Craig Melvin, a reporter with a local television station at the time, was covering the story at Lee Correctional Institution on October 29, 2003. App. 620, lines 1-4. Prior to Melvin's testimony, Lynch objected to Melvin testifying to statements allegedly made to Melvin by Lynch and to the prosecution playing an interview of Lynch by Melvin. The judge ruled the statements were admissible. App. 614, line 13 – App. 617, line 21. Melvin testified that he was told some inmates had taken some guards hostage and were requesting to speak with a member of the media. App. 620, lines 16-19. Melvin was allowed to go inside the prison. App. 621, lines 12-25.

Melvin testified that "At the - - at the end of this, this situation, the – they brought Mr. Lynch over and I proceeded to – to ask him some questions about the situation." App. 622, lines 14-16. Melvin testified that Lynch told him "That he had taken two guards hostage. I remember specifically that he told me that. I also remember specifically him telling me that he –he didn't stab them, that he did take them hostage." App. 622, line 23 – App. 623, line 1. Melvin testified that, "[Lynch] said that specifically an Officer Cotton had been abusing prisoners, I – and again, this has been two years ago, but I think he may have mentioned that Officer Cotton beat up prisoners, that sort of thing, just general—general things." App. 623, lines 4-9. Melvin further testified that "[Lynch] said he just wanted – he wanted to get the word out so that this County and the surrounding counties knew what their loved ones were being subjected to inside the prison." App. 623, lines, 12-15. The audio recording of Melvin's interview with Lynch was played for the jury. State's Exhibit #10.

During closing argument, the state argued the tape of the interview of Lynch by Melvin provided additional incriminating evidence against Petitioner and Lynch. Specifically,

> And then we have Craig Melvin. And Craig Melvin testified that, yeah, I stand in there in the door and I seen this coming down, and he – he interviewed Lynch after the situation had ended. And you heard that.
>
> You heard that - - that tape. It's state's exhibit number 10. And you will have it back there and you can hear it. What does he say? Yeah, we took a hostage. Yeah, I took a hostage. He admits he took the hostage.

App. 870, line 17 – App. 871, line 1. The solicitor returned to this improper argument later:

> The audio tape that we talked about, that is state's exhibit number 10. What's it say? Yeah, I took - - I took some hostages. We took hostages. The video - - the videotape which you will be allowed to see in its entirety if you like - - I showed excerpts of it yesterday, but it can be cued up and you can watch any part of it you wish.

App. 872, line 22 – App. 873, line 3. Repeatedly, the solicitor incorrectly informed the jury that during the interview Lynch indicated he and others, by using the term "we," had taken hostages.

Evidence from the PCR hearing

Petitioner testified that trial counsel provided ineffective assistance by failing to object to the prosecutor's closing argument in which he referenced statements made by Lynch to a television reporter. Specifically, the prosecutor told the jury that Lynch had admitted to taking hostages and had use the term "we" during his admission indicating that individuals other than Lynch were involved. App. 973, line 25 – App. 974, line 24. Petitioner testified that by using the term "we," the prosecutor was relaying to the jury that Petitioner was involved in assisting Lynch. App. 975, lines 3 – 16.

Trial counsel testified that his trial strategy was to show that Lynch was the ringleader and that Petitioner's involvement was very minor. App. 991, lines 10 – 24; App. 992, line 24 – App. 993, line 2. Additionally, trial counsel testified that other inmates were involved but not charged in the incident. Therefore, trial counsel attempted to remove Petitioner from Lynch and hide among the other inmates who were not charged. App. 993, lines 3 – 15. Concerning the Craig Melvin

tape, trial counsel testified that Petitioner was not mentioned by name. Additionally, trial counsel testified that Lynch had made certain statements on the tape that he believed assisted Petitioner in showing that he was not involved or was involved to a lesser degree. App. 993, lines 16 – 24. However, trial counsel did not recall whether Lynch had indicated other inmates were involved. App. 994, lines 8 – 13.

Concerning the prosecutor's closing argument, trial counsel admitted that he did not object to the prosecutor's closing argument. App. 995, line 22 – App. 996, line 1. Trial counsel further testified that the Craig Melvin tape was redacted of any incriminating statements regarding petitioner. App. 999, lines 14 – 21. Trial counsel testified that he did not believe the solicitor's closing argument was highly prejudicial to Petitioner because Lynch's statement "actually may have helped [Petitioner] to some extent." He admitted that the prosecutor argued that Lynch's statement was "we took a hostage," but because the statement did not specifically refer to Petitioner, trial counsel did not find the argument objectionable or prejudicial. App. 1000, line 23 – App. 1001, line 17; App. 1001, line 22 – App. 1002, line 9.

Order Denying Petitioner Relief

The order acknowledged that Petitioner alleged trial counsel was ineffective for failing to object to the solicitor's closing argument in which the solicitor referred to statements made by Lynch and claimed Lynch used the term "we" when referring to the criminal conduct of taking hostages during an interview with Craig Melvin. The PCR judge relied upon trial counsel's testimony that he did not object to the closing argument because he did not believe the comments "were objectionable or prejudicial." Additionally, the order relied upon trial counsel's testimony that the comments made by Lynch suggested that Petitioner played a minor role. Thus, the court

found trial counsel's performance was reasonable and effective and denied Petitioner relief from his convictions and sentences. App. 1008 – 1009.

Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692.

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). The prosecutor's closing argument "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence." State v. Vaughn,

362 S.C. 163, 607 S.E.2d 72 (2004)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

The South Carolina Supreme Court explained an 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. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Thus, to warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial." State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

In Donnelly, 416 U.S. at 643-644, the United States Supreme Court held the prosecutor's improper comments were not so egregious such that they infected the trial with unfairness making the resulting conviction a denial of due process in light of the trial judge's "special pains" to cure the error and the ambiguous nature of the argument. Although the Donnelly Court afforded no relief to the defendant, the Court reaffirmed the long-standing legal principle that the "'Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.'" Id., at 646 (citing Miller v. Pate, 386 U.S. 1, 7 (1967)). The Donnelly Court distinguished the facts before it from Miller, where the prosecutor repeatedly showed the jury a pair of stained undershorts allegedly belonging to the defendant, which the prosecutor described as stained with blood. The undershorts were actually stained with paint. The Donnelly Court explained that "[t]he 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations." On the contrary, "[i]soloated passages of a prosecutor's argument, billed in advance to the jury as a

matter of opinion, not evidence, do not reach the same proportions." Id. Likewise, the Court distinguished Donnelly from Brady v. Maryland, 373 U.S. 83 (1973). As explained by the Court, in Brady, the prosecutor withheld evidence that was directly relevant to the defendant's involvement in the crime. The Court expressed that "manipulation by the prosecution was likely to have an important effect on the jury's determination." Id., at 647.

In Darden v. Wainwright, 477 U.S. 168, 179-182 (1986), the Court held the prosecutor's argument deserved the condemnation it had received; however, the Supreme Court ultimately determined the argument had not so infected the trial with unfairness as to make the resulting conviction a denial of due process. Although the comments were improper, they did not deprive the defendant of a fair trial because the argument did not manipulate or misstate the evidence and did not implicate other specific rights of the defendant, such as the right to counsel or the right to remain silent. Id. at 181-182. Importantly, the Court explained first, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." Id. at 182. Second, the Court noted the trial court instructed the jury numerous times that their decision must be based on the evidence and the arguments of counsel were not evidence. Third, the Court explained the evidence against the defendant was "heavy." Id.

The South Carolina Supreme Court addressed this issue in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In Elijah Mincey's drug distribution trial, two witnesses testified that Mincey had not participated in the drug transaction. Those witnesses were present for the drug transaction and had entered guilty pleas to distribution for their involvement. Id. at 357, 444 S.E.2d at 511. In his closing argument, the prosecutor called Mincey "a pretty intimidating man." He further argued Mincey "must be pretty intimidating for these guys to come before Judge Connor, tell her, yes, we're guilty of this." Id. (emphasis in original). Concerning the confidential informant

in the case, the prosecutor stated "Maybe she's intimidated by Elijah. She's got children. She lives down there too." Id. at 358, 444 S.E.2d at 511 (emphasis in original). The Court held the prosecutor's argument was improper and trial counsel was ineffective for failing to object. "References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats." Id. (citing State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)). As explained by the Court, Mincey's defense was that he was not involved in the drug transaction. The prosecutor's implication that the two witnesses gave false testimony due to intimidation or threats contradicted this defense. The prosecutor's argument was improper because "[t]here was, in fact, no evidence that Mincey intimidated any of the witnesses." Id. at 358, 444 S.E.2d at 511.

The South Carolina Supreme Court granted a defendant a new trial where a prosecutor's closing argument, which "misstated the law by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence of an acquittal." Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not explain the sentencing consequences of the verdicts available to the jury. Id. at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant's guilt because the prosecutor's argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id. at 340, 503 S.E.2d at 167.

In Vaughn, 362 S.C. at 171, 607 S.E.2d at 76, the South Carolina Supreme Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the

prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id. at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id. at 168, 607 S.E.2d at 74.

Accordingly, the PCR court erred in finding no error where trial counsel failed to object and/or move for a mistrial where the prosecutor claimed Lynch's statement to Melvin implicated more than Lynch. The prosecutor argued to the jury that Lynch said "we took a hostage," but the statement, in actuality, only implicated Lynch. The argument was improper as it was not correct in light of the actual statement and it suggested to the jury that someone other than Lynch was involved in the hostage-taking. Petitioner was the only other person on trial; therefore, the jury could conclude only that Petitioner was the person to whom Lynch had implicated by using "we."

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court, reverse his convictions and sentences, and remand the matter for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEE COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

TYRONE SINGLETARY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrone Singletary states:

1. She is an 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 September 20, 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 Tyrone Singletary.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of August, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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RESPONDENT

Appellate Case No. 2012-213528

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 Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Tyrone Singletary, #237129, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 23rd day of August, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of August, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.