

Jul 22 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HAMPTON COUNTY

Perry M. Buckner, Trial Judge
Eugene C. Griffith, Jr., PCR Judge

Appellate Case No. 2023-001946

SIDNEY HOLMES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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INDEX

INDEX.....i

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....4

ARGUMENT.....5

The PCR court properly found trial counsel was not ineffective for not objecting to the solicitor’s closing comments when counsel articulated a valid reason for not objecting and thus was not deficient, and it is not reasonably likely an objection would have changed the outcome of trial when the comment was not objectionable and did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.....5

CONCLUSION.....9

QUESTION PRESENTED

Petitioner's Question

Trial counsel erred in failing to object to the solicitor's closing comments that vouched for the credibility of the only eyewitness in the case in response to her testimony regarding the shooting as this constituted impermissible bolstering, which prejudiced the defense because there was no additional corroborative or forensic evidence available in the case.

Respondent's Counterstatement of Question

The PCR court properly found trial counsel was not ineffective for not objecting to the solicitor's closing comments when counsel articulated a valid reason for not objecting and thus was not deficient, and it is not reasonably likely an objection would have changed the outcome of trial when the comment was not objectionable and did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections serving a cumulative fifty-one-year sentence. In April 2016, the Hampton County Grand Jury indicted Petitioner for murder (2015-GS-25-00265), unlawful carrying of a pistol (2015-GS-25-00266), discharging a firearm at or into a dwelling or a structure (2015-GS-25-00267), and possession of a weapon during the commission of a violent crime (2015-GS-25-00268). On March 13, 2017, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner, III. Robert Hughes, Esquire, represented Applicant, and Randolph Murdaugh and R. Alexander Murdaugh, Esquires, prosecuted the case. The jury convicted Applicant as indicted, and Judge Buckner sentenced him consecutively to forty years for murder, five years each for possession of a weapon and discharging a weapon, and one year for unlawful carrying of a pistol.

Petitioner filed a timely notice of appeal that was perfected by Appellate Defender Susan B. Hackett through filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed pursuant to Anders. The remittitur was sent December 13, 2018.

On December 12, 2018, Petitioner filed an application for PCR alleging he was being held in custody unlawfully due to ineffective assistance of counsel. Respondent filed a return requesting an evidentiary hearing. On August 13, 2021, an evidentiary hearing convened before the Honorable Eugene C. Griffith, Jr. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Samantha J. Weidauer represented Respondent. Following the hearing, Judge Griffith issued an order on December 7, 2023, denying and dismissing the PCR application. This petition for a writ of certiorari followed.

Summary of Relevant Trial Testimony

On August 1, 2015, Steve Cochran (Victim), the maintenance man at Hampton Garden

Apartments, was fatally shot after running off a group of men who were drinking at the apartment complex. At trial, Zandra Bryant testified she was at the apartment complex that evening and saw a group of people outside drinking. She stated Victim approached and told them to leave; although the group left, Bryant testified they appeared to be upset about leaving. About twenty minutes later Bryant “observed an individual walk from behind the building, stop directly in front of [Victim], and just start[] shooting.” Bryant identified Petitioner as the shooter, whom she knew as “Banger.” Bryant stated she initially did not provide Petitioner’s name to police because she was scared. However, she stated Petitioner ran right past her and she recognized him. (App. 55-61, 65).

Victim suffered four gunshot wounds, including a fatal one to his chest. (App. 104-05, 107). Five shell casings were recovered from the scene, and they were determined to have been fired from the same gun. (App. 121, 153). The State also presented a jail call placed using Petitioner’s pin number; in the call he asked, “Did you sell that whistle” or “Did you get rid of that whistle.” (App. 165). An investigator testified that based on his training, the term “whistle” is street slang for a firearm. (App. 165-66).

During closing argument, the solicitor argued:

So we know he had a gun at some point in time. Then, a lady who I have got all the admiration in the world for, that woman is scared to death her entire life. She’s got four children that live out there. She is scared of these people, but she had the guts to walk into this courtroom and she had the guts to tell the truth. The truth being that Sidney Holmes walked up and shot Steve Cochran because he was teed off with him for running him off earlier. How she had the guts to do it, I don’t know, but I admire her.

(App. 243). Ultimately the jury convicted Petitioner as indicted.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found trial counsel was not ineffective for not objecting to the solicitor’s closing comments when counsel articulated a valid reason for not objecting and thus was not deficient, and it is not reasonably likely an objection would have changed the outcome of trial when the comment was not objectionable and did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

Petitioner asserts counsel erred in not objecting to the solicitor’s closing comments that allegedly impermissibly vouched for the credibility of the State’s only eyewitness. He further contends this failure to object was prejudicial because the State’s case hinged on the eyewitness identification testimony. Contrary to Petitioner’s assertion, however, counsel was not deficient because, as the PCR court found, counsel articulated a valid reason for not objecting to this passing comment in that an objection would have likely drawn the bored jury’s attention to what the solicitor was saying. Further—and critically—it is not reasonable an objection would have changed the outcome of trial because the comments did not so infect the trial with unfairness as to result in a denial of due process.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.” Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

A. Trial counsel articulated a valid reason for not objecting and thus was not deficient.

At the PCR hearing, trial counsel agreed the solicitor vouched for the credibility of Bryant's testimony. (App. 324-25). When asked why he did not object, counsel replied:

The reason why I didn't is because the person talking was Randolph Murdaugh. Randolph Murdaugh was a long-winded person who would basically lull a jury to sleep. He would have moments of extreme passion but most of the time he was monotone and would basically lull a jury.

Now, the last thing I wanted to do was to wake up a juror and go, Hey, you needed to listen to this, this was important. No curative instruction in the world would have prevented a jury from hearing what he just said.

The only thing I had going for me as far as the jury ignoring it was the fact that the jury was thinking about other things while he was talking. And Mr. Murdaugh would ramble on and on, and that helped me.

(App. 325). Based on the foregoing testimony by counsel, the PCR court properly found counsel articulated a valid reason for not objecting and thus was not deficient. See Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002) (“Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Here, counsel was in a position at trial to assess the jury's reaction to the State's closing argument. Based on his perception, counsel determined the jury was bored and not listening to the solicitor. Counsel's assessment that objecting to this passing statement would have drawn more attention to it and “awakened” the jury was a reasonable assessment, and his decision to not object for this reason was a reasonable trial strategy—especially when the statement itself was not necessarily objectionable. Thus, the PCR court properly found counsel articulated a valid reason for not objecting and was not deficient.

B. It is not reasonably likely an objection would have changed the outcome of trial when the comment was not objectionable and did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

Improper vouching occurs “when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted.” State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). “To find whether the assistant solicitor’s comments in closing argument violated the defendant’s due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial.” Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). In determining whether an improper comment prejudiced a defendant, “[t]he relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986).

Even if counsel had objected to this statement, it is not reasonably likely an objection would have changed the outcome of trial. Initially, although the statement itself constituted vouching, vouching is not inherently improper for a solicitor in closing argument. See Busse, 439 S.C. at 111, 886 S.E.2d at 212 (“[A] prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, as previously explained, doing so is one of the fundamental responsibilities of a lawyer.”). Rather, vouching by a solicitor becomes improper “when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted.” Id. at 109, 886 S.E.2d at 211.

Here, the solicitor’s comment to the jury regarding Bryant did not cross the line into improper vouching. During closing, the solicitor noted the admiration he had for Bryant, who had the “guts” to testify against Petitioner even though she was afraid. (App. 243). This statement was

a reasonable inference from Bryant's testimony that she did not initially identify Petitioner to police—whom she knew—because she was afraid. (App. 60-61). The solicitor's statement did not imply the solicitor had any outside knowledge about Bryant's credibility but rather was based on evidence admitted at trial. Thus, it did not cross the line into improper vouching, and it is not reasonably likely an objection would have been sustained or changed the outcome of trial. See Id. at 114-15, 886 S.E.2d at 214 (finding solicitor's closing argument about the portions of the child-victim's statements that he found compelling did not cross the line into improper vouching).

Assuming *arguendo*, the statement did constitute improper vouching, which the State does NOT concede, this passing statement that the solicitor found Bryant admirable did not so infect the trial with unfairness as to violate due process. See Darden, 477 U.S. at 168 (finding prosecutor's improper comments—which included statements such as “He shouldn't be out of his cell unless he has a leash on him” and “I wish that I could see him sitting here with no face, blown away by a shotgun”—did not “so infect the trial with unfairness as to make the resulting conviction a denial of due process”). Thus, the PCR court properly found Petitioner did not prove prejudice.

CONCLUSION

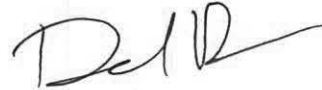
Based on the foregoing, this Court should deny the petition for a writ of certiorari.

Respectfully Submitted,

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This 22nd day of July, 2024