

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

RECEIVED

OCT 16 2013

S.C. Supreme Court

RANDY ELDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213665

PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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ISSUES PRESENTED

- I. Trial counsel provided ineffective assistance of counsel to Petitioner where trial counsel advised Petitioner to proceed under the invalid trial strategy of pleading guilty to (1) carjacking and (2) assault and battery with intent to kill of Dwight Riggs where Petitioner in essence admitted to many of the underlying facts needed by the State to prove to a jury that Petitioner was also guilty of (1) two counts of kidnapping; (2) armed robbery; and (3) assault and battery with intent to kill of Kathryn Riggs. In addition, in sentencing Petitioner after a full trial of the case to the counts to which he pled guilty, the trial judge gathered a fuller appreciation of the nature and extent of the crimes charged than he would have during a plea hearing thus leading to a harsher sentence for Petitioner for these two counts.

- II. Trial counsel provided ineffective assistance of counsel by failing to object to the solicitor's closing argument when the solicitor's comments impermissibly appealed to the passions of the jurors, impugned defense counsel, and asserted that Petitioner was fabricating a defense and so infected the trial with unfairness as to make the resulting conviction a denial of due process.

STATEMENT

Indictments

On June 15, 2005, Petitioner Randy C. Elders was indicted by the Richland County Grand Jury for (1) carjacking of Dwight Riggs; (2) armed robbery of Kathryn Riggs; (3) kidnapping of Kathryn Riggs; (4) kidnapping of Dwight Riggs; (5) assault and battery with intent to kill ("ABWIK") of Dwight Riggs; and (6) ABWIK of Kathryn Riggs. App. 654-670.

Trial, Guilty Pleas, Jury Verdict and Sentence

On February 13-17, 2006, Petitioner appeared before the Honorable James W. Johnson, Jr. and a jury. App. 1. Petitioner was represented by April W. Sampson and Stacy R. Owings. App. 1. The State was represented by Assistant Solicitors Kathryn L. Campbell and Aaron S. Jophlin. Id.

After jury selection but prior to opening statements, Petitioner pled guilty to the counts of (1) carjacking of Dwight Riggs and (2) ABWIK of Dwight Riggs outside of the presence of the jury. App. 66, l. 3 – 78, l. 1. The trial judge did not sentence Petitioner on those counts immediately after the plea but waited until the end of the trial.

The jury trial proceeded as to the remaining four indictments: (1) armed robbery of Kathryn Riggs; (2) the two counts of kidnapping Kathryn Riggs and Dwight Riggs; and (3) ABWIK of Kathryn Riggs. Prior to opening statements, the trial judge informed the jury that Petitioner had pled guilty to the counts of carjacking and ABWIK of Dwight Riggs. App. 79, ll. 6-11.

The jury found Petitioner guilty of (1) armed robbery; (2) the two counts of kidnapping; and (3) the lesser included offense of assault and battery of high and aggravated

nature (“ABHAN”) with respect to the charge of ABWIK of Kathryn Riggs. App. 457, l. 18 – 458, l. 3.

Judge Johnson sentenced Petitioner as follows: (1) fifteen (15) years for ABWIK; (2) ten (10) years for ABHAN; (3) thirty (30) years for armed robbery; and (4) thirty (30) years on each kidnapping count, all to run concurrently to each other but consecutive to a twenty (20) years sentence for carjacking. App. 462, ll. 1-21.

First Application for Post-Conviction Relief (2006-CP-40-4859)

On August 23, 2006, Petitioner filed his first application for post-conviction relief (“PCR”). App. 464-469. The State filed a Return and Motion to Dismiss without Prejudice on February 5, 2007 asserting that Petitioner had a direct appeal pending in the South Carolina Court of Appeals and therefore PCR was not yet available to Petitioner. App. 470-473.

Direct Appeal

Petitioner had filed a direct appeal of the jury verdict with the South Carolina Court of Appeals which was heard on December 9, 2009. App. 474. Petitioner was represented by Robert William Mills in this appeal. *Id.* On January 28, 2010, the Court of Appeals affirmed Petitioner’s convictions. App. 474-481.

Second Application for Post-Conviction Relief (2010-CP-40-8822) and Evidentiary Hearing

On December 17, 2010, Petitioner filed his second PCR application. App. 482-488. The State filed a Return and Motion to Withdraw its Proposed Order of Dismissal Without Prejudice on January 30, 2012. App. 489-501.

An evidentiary hearing was held before the Honorable L. Casey Manning on May 24, 2012. App. 502-635. Petitioner was represented by Tristan M. Shaffer, and the State was represented by Assistant Attorney General Robert D. Corney. App. 502.

The State advised the PCR court that it was proceeding on both of Petitioner's PCR applications as the PCR filed in 2006 was timely because it addressed the charges to which Petitioner pled and did not directly appeal and as the PCR filed in 2010 was timely since it addressed the jury verdicts which had been directly appealed. App. 506, l. 14 – 507, l. 6.

At the evidentiary hearing, Petitioner and his two trial attorneys, April W. Sampson and Stacy Rowell (formerly Owings), testified.

Order of Dismissal

Judge Manning filed his Order of Dismissal on November 19, 2012, finding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant the relief requested in his PCR application. App. 637-653.

This petition for writ of certiorari follows.

ARGUMENT

- I. **Trial counsel provided ineffective assistance of counsel to Petitioner where trial counsel advised Petitioner to proceed under the invalid trial strategy of pleading guilty to (1) carjacking and (2) assault and battery with intent to kill of Dwight Riggs where Petitioner in essence admitted to many of the underlying facts needed by the State to prove to a jury that Petitioner was also guilty of (1) two counts of kidnapping; (2) armed robbery; and (3) assault and battery with intent to kill of Kathryn Riggs. In addition, in sentencing Petitioner after a full trial of the case to the counts to which he pled guilty, the trial judge gathered a fuller appreciation of the nature and extent of the crimes charged than he would have during a plea hearing thus leading to a harsher sentence for Petitioner for these two counts.**

Relevant Facts from Trial

Petitioner and his girlfriend, Christina Hall, were arrested and indicted for alleged offenses that occurred the evening of April 17, 2006. At approximately 7:30 p.m. that evening, Dwight Riggs and his wife Kathryn were returning home from church when they stopped at the Bi-Lo grocery store on Garners Ferry Road in Columbia, South Carolina. Mrs. Riggs went into the store, and Mr. Riggs remained in the car. As he waited for his wife, Mr. Riggs was approached by a woman he had never seen before. The woman asked Mr. Riggs to give her and her male companion a ride to Mike's Produce Market, which was located a short distance away on Garners Ferry Road. Mrs. Riggs returned to the car and sat down in the front passenger seat. The woman, along with her male friend, got into the back seat of the car, with the man sitting directly behind Mrs. Riggs. Mr. Riggs drove to Mike's Produce Market and pulled into the parking lot.

Upon their arrival, the male passenger allegedly placed a knife to Mrs. Riggs' neck and told Mr. Riggs to "keep going straight." According to Mrs. Riggs, the knife had a "little hump" on it and a blade that was about six to eight inches long. Instead of complying with the man's orders, Mr. Riggs grabbed both of the man's hands and pulled him out of the car.

A struggle ensued on the pavement outside of the car, and Mr. Riggs was stabbed in the wrist and the chest. The man subsequently broke away from Mr. Riggs and ran over to Mrs. Riggs, who had exited the car. App. 474-475.

According to Mrs. Riggs, the man proceeded to tackle her and take her purse. App. 147, ll. 8-21. Other witnesses who testified at trial, include Sherry Abbott and Christina Hall, did not see the man tackle Mrs. Riggs or see him take a purse from Mrs. Riggs. App. 166, l. 21 – 167, l. 7; 311, ll. 3-9. Christina Hall testified that the first time she saw Mrs. Riggs' pocketbook was in the front seat of the car after she and the man left the scene in car. App. 283, ll. 3-6; 311, ll. 10-13. Mrs. Riggs admitted that she did not see the man with a knife in his hand when the man allegedly attacked her. App. 147, ll. 19-21. Mrs. Riggs broke her toe and scraped her arm and knee. The man and the woman left the scene in the Riggs' car. App. 475.

The police later concluded that the man and woman were Petitioner and Hall. In connection with the incident, Petitioner was indicted for one count of armed robbery, two counts of assault and battery with intent to kill (ABIK), one count of carjacking, and two counts of kidnapping. Prior to opening statements, Petitioner informed the trial court that he wanted to plead guilty to the carjacking charge and the ABIK charge involving Mr. Riggs. The State objected, arguing that the guilty pleas would hinder its ability to present a cogent case regarding the other four charges. After hearing arguments on both sides, the trial court allowed Petitioner to plead guilty to both the carjacking charge and the ABIK charge concerning Mr. Riggs. App. 48 - 78.

Petitioner's trial counsel wanted Petitioner to plead in front of the jury so that the jury panel could hear Petitioner say I am guilty of these two charges, but not the other four.

App. 56, ll. 15-18. The trial judge, however, would not allow Petitioner to plead guilty in front of the jury. App. 63- 78. The trial judge did inform the jury that Petitioner had pled guilty to the count of carjacking and the count of ABWIK with respect to Mr. Riggs. App. 79, ll. 6-11. Defense counsel also informed the jury during her opening statement that Petitioner had already pled guilty to those two charges and took responsibility for those offenses. App. 92, l. 12 – 93, l. 20. Defense counsel told the jury that while Petitioner “did so some very bad, very very bad things, he didn’t commit armed robbery, assault and battery with intent to kill [with respect to Mrs. Riggs], [and] two counts of kidnapping.” App. 93, ll. 17-20.

At trial, the State was permitted to present evidence on all charges, including the charges to which Petitioner pled guilty. The State’s evidence included extensive testimony from Mr. Riggs who testified about being stabbed by Petitioner and his injuries. App. 103-143.

The jury ultimately disagreed with Petitioner and found him guilty of armed robbery, two counts of kidnapping, and the lesser included offense of assault and battery of a high and aggravated nature. App. 457, l. 18 – 458, l. 3

Relevant Facts from the PCR Hearing

Both defense counsels testified that essentially the only strategy they had for Petitioner was for him to plead straight up without any recommendation from the solicitor to the charges of carjacking and ABWIK of Mr. Riggs. The purported goal of this strategy was for the jury to see Petitioner taking responsibility for the carjacking and ABWIK of Mr. Riggs and give the jury the “subliminal message” that Petitioner was not guilty of the other four indictments against him. App. 524, l. 11 – 525, l. 14; 566, l. 9 – 567, l. 21. In the

end, that strategy backfired since Petitioner was not allowed by the trial judge to actually plead guilty in the presence of the jury. App. 525, ll. 16-18; 527, ll. 7-13.

Petitioner's defense counsel also thought that by Petitioner pleading guilty to the carjacking and ABWIK of Mr. Riggs, that they could limit the evidence the State could present with respect to the assault of Mr. Riggs since at that point it would be irrelevant. That strategy did not work as well since the trial judge let the State present a full case as to all charges against Petitioner. App. 528, ll. 3-15.

Deficient Performance

By advising Petitioner to plead guilty as to the charges of carjacking and ABWIK of Mr. Riggs and then to proceed to trial on the remaining charges against him, Petitioner essentially went to trial after having admitted all of the underlying facts of the incident. It was unreasonable of Petitioner's trial counsel to expect a jury to not find him guilty on the remaining charges after Petitioner had admitted to the events underlying those charges. Furthermore, because the trial judge withheld sentencing on the two charges to which Petitioner pled until the conclusion of the trial on the other charges, the trial judge became aware of much more evidence with respect to those charges than it would have during a plea hearing. This factor plausibly led to the trial judge imposing a harsher sentence for the carjacking and ABWIK of Mr. Riggs charges than it would have imposed after a plea hearing. The only strategy undertaken by Petitioner's defense counsel constituted unreasonable trial strategy for which Petitioner is entitled to relief.

To establish ineffective assistance of counsel, 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, 117, 386 S.E.2d 624, 625 (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 117-18, 386 S.E.2d at 625 (internal citations omitted).

With respect to guilty pleas, in Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court adopted the two-part standard in Strickland, and applied the Strickland standard to guilty plea challenges based on ineffective assistance of counsel. To prove ineffective assistance of counsel from a guilty plea, the defendant must show: (1) “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases” and (2) that “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Hill, 474 U.S. at 57-59.

Where defense counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Defense counsel may not, however, explain away errors and omissions which acted to the prejudice of his client’s ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, this Court held that:

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it

is measured against an objective standard of reasonableness.

348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (emphasis in original) (internal citations omitted).

Petitioner both pled guilty and went to trial with an invalid strategy as advised by his defense counsel. First, his counsel advised him to plead straight up guilty to two charges without any recommendation by the solicitor and only to those two charges. Upon their advice, Petitioner did so but then had a face a trial where the solicitor presented extensive evidence as to all charges, including the charges to which Petitioner had just pled guilty. The trial judge became privy to much more information surrounding the carjacking and ABWIK charges to which Petitioner pled guilty than it would have had there only been a plea hearing.

The United States Supreme Court has recognized that sentences imposed following a full trial may well likely be harsher than those imposed by a trial judge after a brief plea hearing. Alabama v. Smith, 490 U.S. 794 (1989). “[T]he relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial.” Id. at 801, 803 (noting sentencing may be harsher after a trial because of “the greater amount of sentencing information that a trial generally affords as compared to a guilty plea”). In the Smith case, in holding that no presumption of vindictiveness arose when a sentence imposed after trial was greater than that previously imposed after a guilty plea, the Court made the following observations:

As this case demonstrates . . . in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant’s conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. . . . Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present.

Id. at 802.

This same reasoning applies to this case where Petitioner was advised to plead guilty to only two counts but to proceed to trial on the remaining counts, thus giving the trial judge a more complete picture of the alleged crimes and a fuller appreciation of the nature and extent of the crimes charges. Now having this information, the trial judge did not offer Petitioner any leniency for having accepted responsibility for two of the charges and instead sentenced him to the maximum for carjacking and almost the maximum for the ABWIK of Mr. Riggs. App. 656, 668.

Compounding the error of Petitioner's defense counsel's ill-advised strategy was the fact that Petitioner then went to trial on the remaining indictments against him, including two counts of kidnapping, armed robbery, and one count of ABWIK of Mrs. Riggs, after having in essence admitted to the events that occurred that day by pleading to the carjacking and ABWIK of Mr. Riggs.

For the armed robbery charge, the State had to prove that Petitioner committed robbery while armed with a deadly weapon. S.C. CODE ANN. 16-11-330(A). By having Petitioner plead to the ABWIK of Mr. Riggs, Petitioner's defense counsel thereby had him admit that he stabbed Mr. Riggs with a knife and therefore was in possession of a knife when he allegedly attacked and robbed Mrs. Riggs. Petitioner now faced an uphill battle at trial in trying to establish that he did not commit the offense of armed robbery.

By having Petitioner admit that he carjacked Mr. Riggs, Petitioner's defense counsel also limited his ability to defend against the kidnapping charges against him. Where Petitioner admitted to the underlying events leading to the carjacking, he admitted to restraining the Riggs for even just a brief time to complete the carjacking. Under our

State's law of kidnapping, even if the kidnapping is incidental to another offense and the seizure of the persons was only done to facilitate the commission of the other offense, the defendant is still guilty of the crime of kidnapping. See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983).

The overall strategy of Petitioner's defense counsel was utterly unreasonable and constituted ineffective assistance of counsel. Petitioner's defense counsel either should have advised to him plead guilty to all charges or to have either taken all charges to trial instead of this piecemeal strategy which prejudiced Petitioner as to both the charges to which he pled guilty and the charges that proceeded to trial. Petitioner is entitled to a fresh start and a reversal of his convictions on all counts. Petitioner accordingly requests this Court for a new trial on all six indictments against him.

II. Trial counsel provided ineffective assistance of counsel by failing to object to the solicitor's closing argument when the solicitor's comments impermissibly appealed to the passions of the jurors, impugned defense counsel, and asserted that Petitioner was fabricating a defense and so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Petitioner's defense counsel also failed to object to certain closing arguments by the solicitor. During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, the "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted). In State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007), this Court stated:

Solicitors are bound to rules of fairness in their closing arguments ... While the solicitor should prosecute

vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

(internal citation and quotation omitted).

“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.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding “[i]mproper 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.”); See State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”). Ultimately, “[t]he appropriateness of a solicitor's . . . argument is a matter left to the trial court's sound discretion.” Id. at 548, 586 S.E.2d at 156.

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-88. Specifically, trial counsel failed to object when the solicitor made improper comments during closing argument. The solicitor's improper comments are as follows:

- (1) “There is an old joke and it talks about a lawyer and a priest walking down the street. There is mud on one side. There is a puddle of water there and it's got this much water and the priest looked down and said, look there is a silver dollar. Get a stick and stir it up and the silt and mud rose up and mixed in. You couldn't see it anymore. It just went muddy . . .” App. 405, ll. 11-18 (comments by solicitor as to defense counsel's strategy) See State v. Parker, 391 S.C. 606, 615 n.3, 707 S.E.2d at 799, 803 n. 3 (2011) (“It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel.”).

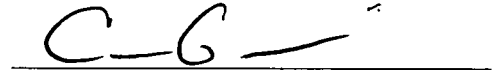
- (2) “[I]f this isn’t smoke and mirrors, what is it? It’s not an unusual offense. It’s called the art of confessing error. Maybe the jury knows. They’ll just take responsibility just on a couple. They’ll feel sorry for me. I submit, Ladies and Gentleman, when he was trying to stab and kill that man and his wife, he was a monster. The art of - - I’ll admit to the couple so the jury will just feel sorry for me and won’t totally respond for all my actions that day.” See Parker, 391 S.C. at 615 n.3, 707 S.E.2d at 803 n. 3 (“It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel.”).

Petitioner’s trial counsel should have objected to these improper remarks by the solicitor during closing argument which impugned defense counsel and accused Petitioner of fabricating a defense. Accordingly, the PCR court erred in finding trial counsel was not ineffective in failing to object to these remarks because trial counsel’s performance was not reasonable “under prevailing professional norms.” See Strickland, 466 U.S. at 687-88.

CONCLUSION

For the foregoing reasons, Petitioner Randy C. Elders requests this Court to grant his petition for writ of certiorari and allow full briefing on the issues set forth herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C-G', is written above a horizontal line.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

RANDY ELDERS,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

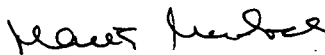
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Randy Elders, #263032, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of October, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of October, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.