

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

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S.C. Supreme Court

CEDRIC C. PATTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-001029

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

The PCR judge ruled properly in granting petitioner's request for a belated direct appeal of his convictions and sentences because trial counsel failed to file a notice of appeal as requested in the case.

Trial counsel erred in failing to object to the solicitor's improper vouching during closing arguments because the prejudicial effect of the same violated petitioner's right to a fair trial.

STATEMENT

Petitioner Cedric C. Patton was convicted of armed robbery and possession of a weapon during the commission of a violent crime at the July 2010 term of the Greenville County General Sessions Court before Judge C. Victor Pyle, Junior. Petitioner was sentenced to prison for an aggregate term of twenty-five years, but did not enjoy the benefit of a direct appeal. App. 1-153. Dan Farnsworth represented petitioner at trial and Assistant Solicitor Perry DeLoach appeared on behalf of the state in the case. Petitioner did not enjoy the benefit of a direct appeal in his case.

On March 9, 2011, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 155-161. The respondent filed a return requesting that a hearing be held in response to petitioner's action filed in the case. App. 162-165.

A PCR hearing was convened on April 18, 2013, at the Greenville County Courthouse before Judge G. Edward Welmaker. Petitioner was present at the hearing and represented by Elizabeth Wiygul at that time. Trial counsel Dan Farnsworth was not present at the PCR hearing due to health issues. Assistant Attorney Karen Ratigan appeared on behalf of the state at the PCR hearing.

On April 3, 2013, Judge Welmaker issued an Order granting petitioner's request for a belated direct appeal via White v. State,¹ but denied the remainder of his allegations of ineffective assistance of counsel in the case. App. 187-193.

Petitioner appealed Judge Welmaker's Order. This petition follows.

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

QUESTION I

The PCR judge ruled properly in granting petitioner's request for a belated direct appeal of his convictions and sentences because trial counsel failed to file a notice of appeal as requested in the case.

During the PCR hearing, petitioner testified that he informed counsel of his desire to appeal his case, but that counsel failed to honor this request, and in effect conceded error by advising him (petitioner) to file a PCR application in order to obtain a belated direct appeal. Petitioner's testimony regarding the matter of the appeal follows:

PCR Counsel: Did he [trial counsel] file an appeal?

Petitioner: No, ma'am.

PCR Counsel: When did you find out he had not filed an appeal? Would that have been when you got a letter from the Court of Appeals in January of 2011?

Petitioner: Yes, ma'am.

PCR Counsel: And what did that letter tell you?

Petitioner: It's in my file saying that he didn't remember me mentioning about an appeal, but I could put in for a PCR.

PCR Counsel: And that letter was from Mr. Farnsworth?

Petitioner: Yes, Ma'am. App. 179, lines 13 – 25.

Also, Assistant Attorney General Karen Ratigan "consented to a belated direct appeal" during the PCR hearing. App. 185, l. 13-16.

The PCR judge ruled that "the respondent consented to a belated appeal" and that out of an abundance of caution, petitioner "should receive a belated appeal from his trial." App. 192-193.

If after advising an indigent client requesting an appeal the client wishes to appeal, then trial counsel must serve and file a notice of appeal as required by Rule 203, SCACR. See In Re Anonymous Member of the Bar, 303 SE 306, 400 S.E. 2d 483 (1991). A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 SC 110, 208 S.E. 2d 35 (1975). Here, petitioner did not voluntarily waive his right to an appeal; but rather it was trial counsel's ineffectiveness in failing to file a notice of appeal that resulted in petitioner's failure to receive a direct appeal. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal in the case.

QUESTION II

Trial counsel erred in failing to object to the solicitor's improper vouching during closing arguments because the prejudicial effect of the same violated petitioner's right to a fair trial.

At trial, Alfredo Cortez-Roa testified that he was present at Club Caliente on the morning of May 16, 2009, around 2:30 a.m., and went to his car to smoke a cigarette when he saw several persons whom he believed looked suspicious walk near his car. Roa stated that a female (Emma Rosario) was seated in his car with him in the passenger seat while he smoked. Roa went on to explain that minutes later, two males returned to his car along with a female, and that one male came to his side of the car, put a gun to his head and ordered him to surrender his wallet, money, phone, and other personal effects. Roa added that a female holding a baseball bat appeared at the passenger side window and demanded money from the female who sat with him in the car, but that she had no money to give. Roa stated further that he gave the perpetrator his money, driver's license and citizen's papers, and his cell phone. App. 21, l. 1-p. 37, l. 20; App. 30, l. 11-p. 31, l. 20.

State's witness Santana Carrington testified that she and appellant and Kaitlin Rochester were involved in the robbery of Roa at Club Caliente on the night in question, and that appellant put a gun to the "male Mexican's head" and that she held a bat and stood at the passenger side of the car. App. 79, l. 5-p. 83, l. 11.

State's witness Kaitlin Rochester testified that she and appellant met up with Carrington on the night of the Club Caliente robbery and that appellant had a gun, and that it was his (appellant's) idea to "get em." Rochester explained that appellant went up to the driver's side of the car, held a gun to the driver's head and demanded money, which he received. Rochester stated that Carrington stood at the passenger side wielding a baseball bat, and that she (Rochester) stood at the back of the vehicle (presumably as a look-out). Rochester stated that she and Carrington received \$40.00 cash from the robbery. App. 91, l. 16-p. 97, l. 11.

Appellant did not testify at trial, but he put forth an alibi defense before the jury. Defense witness A.J. Smith testified that he was with appellant on the night of May 15, 2009, after he picked-up appellant and brought him to his home shortly before midnight; and that around 2:00 a.m. on May 16, 2009, they were watching television and playing on the computer. Smith stated that he and appellant woke up at 4:45 a.m. and left the house shortly thereafter to look for job opportunities. App. 1, 1-p. 113, l. 21.

During the PCR hearing, petitioner testified that trial counsel erred in failing to object to the solicitor's comments that constituted improper vouching during closing arguments where he (solicitor) referred to the credibility of the state's witnesses who testified in the case. App. 178, l. 2-12. Counsel was not present to testify at the PCR hearing.

The PCR judge ruled that petitioner failed to establish that trial counsel was ineffective with respect to this vouching issue because “an objection was not warranted” as the solicitor’s comments did not constitute vouching.” App. 191.

The solicitor’s comments at issue during closing arguments follow:

Solicitor: When I offered those, that lady and that man – excuse me, those two ladies and their deals, I asked for one thing and one thing only. It’s the only thing I ever ask when talking to a co-defendant and that’s you give me the truth. If you give me the truth, the whole truth and nothing but the truth, then you’ll get what I’m offering you. That’s all I ask. It doesn’t matter if it benefits me. It doesn’t matter if it benefits the state. I’m not asking you to go up there and perjure yourself. You go up there and tell the truth and you get the deal. And that’s exactly what they did, ladies and gentlemen. These people are not like you and me. They’re not, they’re not working people. I’m not saying they are. I’m not trying to paint them into some people they’re not, because they’re not. But that doesn’t mean that what they said on that stand yesterday wasn’t true.
App. p. 136, l. 18 – p. 137, l. 8.

A prosecutor cannot vouch for a witness’ credibility. State v. Shuler, 344 S.C. 604, 630 S.E.2d 805 (2001). Improper vouching occurs when the prosecution places the government’s prestige behind a witness by making explicit assurances of a witness’ veracity or when the prosecutor implicitly vouches for a witness’ veracity by indicating information not presented by the jury supports the testimony. State v. Kelly, 343 S.C. 350; 540 S.C. 2nd 851 (2001). The Kelly Court reversed where the solicitor queried a witness on his (solicitor’s) standard of testifying truthfully at trial and in relation to a plea agreement, which in turn suggested that the solicitor believed the witness was telling the truth, and this meant that the witness’ testimony “carried with it the imprimatur of the government.” The Kelly Court held that this type of improper bolstering might have “induced the jury to trust the state’s judgment about the witness.”

See also Gilchrist v. State, 350 S.C. 221; 565 S.C. 2nd 281 (2002), where the Court reversed where the solicitor improperly vouched for the witness’ credibility by praising one of the

perpetrators for coming “clean” and in effect “cleansing” his soul by admitting his role of the armed robbery of the victim in the case. In Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004), the Court held that despite the fact that defense counsel opened the door on the question of the why only one of the two officers who found drugs at the scene were called to testify at trial; nonetheless, the solicitor erred in vouching during closing arguments for the absent officer by assuring the jury that this officer was not a liar and would have stated the same facts the officer who did testify at trial because this was improper bolstering that prejudiced petitioner’s case since the evidence was not overwhelming as the two officers’ drug findings during the search constituted the only evidence against that defendant.

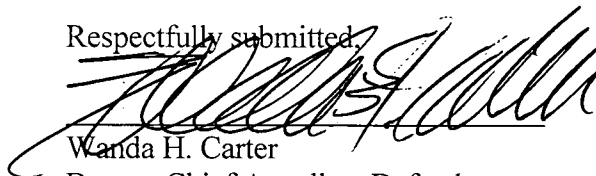
In the case at bar, both Carrington and Rochester testified in reference to their deals to plead guilty to lesser charges and receive lenient sentences in exchange for their testimony against petitioner at trial. App.78, lines 15-17; App. 89, l. 22- p. 90, l.8. In addition, the solicitor questioned both Carrington and Rochester in front of the jury about how the truthfulness of their testimony sealed their deals and that they would receive the benefit of the bargain, i.e., their plea deals in exchange for their truthful testimony at trial. Carrington and Rochester answered in the affirmative when asked by the solicitor at trial if they were giving truthful testimony. App. 90, l. 3 – 11; App. 78, lines 3-14. Therefore, the issue of truthfulness was more than adequately covered at trial. Nothing else needed to have been said in the matter as it was the role of the jury to assess the credibility of the witnesses and decide questions of fact in a case, particularly where the witnesses’ testimony was clearly damaging to the defense at trial. Compare, State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). Here, the solicitor’s placement of his seal of approval on the truthfulness of Carrington’s and Rochester’s testimony during closing arguments was unnecessary, but more importantly impermissible via an evidentiary basis. Thus, trial counsel’s failure to object to the

solicitor's improper remarks (vouching) in the case constituted error as well and but for trial counsel's error in failing to object to the same, a reasonable probability exists that the outcome of the case might have been different. Counsel's error in this regard violated the Sixth and Fourteenth Amendments to the United States Constitution and article 1, §14 of the South Carolina State Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing arguments, petitioner requests that the Court grant this petition and allow full briefing on the issues.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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G. Edward Welmaker, Circuit Court Judge

CEDRIC C. PATTON,

PETITIONER,

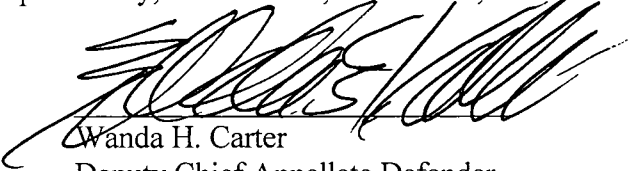
V.

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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Cedric C. Patton #304790, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of January, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of January, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.