STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2012-213604

Heyward Davis, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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QUESTION PRESENTED

Did the PCR judge properly find trial counsel was not ineffective in failing to object to the solicitor's closing arguments where the argument did not contain any objectionable material, overwhelming evidence indicated Petitioner's guilt, and the jury charge cured any impropriety in the argument?

STATEMENT OF THE CASE

In June 2006, the Georgetown County Grand Jury indicted Petitioner for assault and battery with intent to kill (ABWIK) (2006-GS-22-0529), assault with intent to kill (AWIK) (2006-GS-22-0530), first degree burglary (2006-GS-22-0531) and possession of a weapon during the commission of a violent crime (2006-GS-22-0532). (App. pp. 400-14). Charles D. Barr, Esquire, ("trial counsel") represented Petitioner. (App. p. 1). On May 1, 2007, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury. (App. p. 1). On May 2, 2007, the jury found Petitioner guilty as indicted on all charges. (App. pp. 293). Judge Burch sentenced petitioner to concurrent terms of imprisonment of twenty (20) years for ABWIK, ten (10) years for AWIK, twenty-five (25) years for first degree burglary, and five (5) years for possession of a weapon during the commission of a violent crime. (App. pp. 301-02). Trial counsel filed a timely notice of appeal, and LaNelle C. DuRant, Esquire, perfected an appeal on Petitioner's behalf. (App. p. 304). On April 27, 2009, the South Carolina Court of Appeals affirmed Petitioner's conviction. (App. p. 304).

Petitioner filed an Application for Post-Conviction Relief on September 23, 2009. (App. p. 305). Respondent made its return on or about October 22, 2009. (App. p. 318). The Honorable Larry B. Hyman, Jr. ("PCR Judge") convened a hearing into the application on August 26, 2010, in Georgetown County. (App. p. 323). Applicant was present and represented by Paul Archer, Esquire ("PCR counsel"). (App. p. 323). Christina Catoe, Esquire, represented Respondent. (App. p. 323). The PCR judge denied and dismissed the application by written order filed October 19, 2010. (App. p. 336).

The PCR judge denied Petitioner's *pro se* motion to alter or amend on December 20, 2010. (App. p. 347).

Petitioner filed a second application on December 29, 2011. (App. p. 350). In that application, Petitioner alleged PCR counsel did not file a timely notice of appeal from the PCR judge's order dismissing his first PCR action. (App. p. 355). Respondent filed a Return and Motion to Dismiss on March 1, 2012. (App. p. 360). The Honorable Steven H. John convened a hearing into the application on November 16, 2012. (App. p. 367). Applicant was present and represented by Brett Mehalic, Esquire. (App. p. 367). T. Andrew Johnson represented Respondent. (App. p. 367). Judge John granted Petitioner an appeal of his first PCR hearing by written order filed November 20, 2012. (App. p. 395).

ARGUMENT

I. Probative evidence supports the PCR judge's finding trial counsel was not ineffective for failing to object to the solicitor's closing argument.

Petitioner argues trial counsel was ineffective in failing to object to the solicitor's closing argument. However, the record clearly demonstrates the solicitor did not engage in improper vouching during her closing argument.[1] Therefore, trial counsel was not ineffective for not objecting to the argument.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. The court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 668). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

The court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. First, the applicant must prove counsel's performance was

[1] Petitioner did not present any testimony at the PCR hearing regarding the solicitor's closing arguments. Respondent questions whether this issue is preserved for review in light of the lack of presentation of evidence regarding it at the hearing. However, if the issue is preserved, evidence from the trial record indicates the solicitor remained well within the bounds of permitted argument.

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief where probative evidence supports the circuit court's findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

Here, trial counsel was not ineffective because the solicitor's comments were not objectionable. A solicitor's argument is limited to evidence in the record and the reasonable inferences to be drawn therefrom. Smith v. State, 375 S.C. 507, 522-23, 654 S.E.2d 523, 531 (2007) (citing State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996)). A solicitor may state her version of the testimony and comment on the weight she believes the jury should give such testimony. Id. at 523, 654 S.E.2d at 531-32 (citing Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004)). However, she cannot vouch for the credibility of witnesses based on personal knowledge or other evidence not presented on the record. Id., 654 S.E.2d at 532 (citing Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002)).

Petitioner's challenge to the following statement is without merit:

> Now, I don't know about you but listening to that 911 call, wow, that was bone chilling. Even if you don't believe a word out of the victim's mouth, either victim's mouth on that witness stand, either that lady deserves an academy award or I don't know what. If she were just making up her ex-boyfriend's name Heyward — you heard it on the 911 tape, who shot you? The 911 operator said. Who shot you, who did this? Heyward. Heyward Davis. Well, she's either a really great actress to be able to come up if —

> if someone came into the house and call his name or she's telling the truth. And she's telling the truth. She told you on the stand what happened. The male victim told you on the stand what happened, Chris. His story has never lingered. She told you the same thing on the stand that you heard on that 911 call. My ex-boyfriend broke into my house. He shot my baby's dad, Chris. And he tried to shoot at me.

(App. p. 244). This statement does not "convey[] the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction." Matthews, 350 S.C. at 276, 565 S.E.2d at 768 (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001)). Rather, it is a reasonable argument based on the evidence presented at trial. The State played the 911 tape where the victim identified Petitioner. (App. p. 234). The victim also testified Petitioner was the person who fired shots that night. (App. p. 145). Thus, the solicitor's statements are proper comments on the weight she believed the jury should give the victim's testimony. See State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (citing State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)), overruled on other grounds by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006)). Therefore, the comments were not objectionable.

Likewise, the solicitor's comment about the victims' motivations to lie is not objectionable. (App. p. 245). This comment merely asks the jurors to consider the victim's motive in determining credibility. Again, it does not intimate any personal knowledge of truthfulness on the part of the solicitor.

Finally, the solicitor's comment about the corroborating evidence is proper. (App. p. 245). After stating the evidence corroborated the victim's testimony, the solicitor told the jury:

> SLED agent, Ms. Cromer, came on the stand and said, I know, I know this spent casing, State's Number 10 — you'll have it back in the room with you — I know, I can positively say it came from that firearm. The firearm, the only testimony you've heard is, the firearm was brought to the

> attention of Investigator Lee by the defendant. He calls Investigator Lee on the phone, I want to turn myself in, I want to turn myself in. Where's the firearm? Oh, it's over there on Cherry Street.

(App. p. 245). Again, this comment is a summary of the evidence. The SLED firearms expert matched the bullet from the crime scene to Petitioner's firearm. (App. p. 234). The investigating agent located the firearm with Petitioner's help. (App. pp. 195-96). The solicitor's comments do not indicate there is some evidence not before the jury that establishes Petitioner's guilt. Instead, the solicitor merely recited her version of the evidence presented at trial. Such commentary is permissible, and thus not objectionable.

The PCR judge also properly found there was overwhelming evidence of petitioner's guilt. (App. p. 339). Even if a solicitor's comments were objectionable, an applicant cannot show prejudice where there is overwhelming evidence of his guilt. Smith, 375 S.C. at 523, 654 S.E.2d at 532 (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). As outlined above, the solicitor's comments were merely summaries of the evidence presented against petitioner. Both victims testified Petitioner was the person who entered the trailer and fired a firearm. (App. p. 43; p. 145). One victim testified she recognized the firearm as Petitioner's. (App. pp. 150-51). Petitioner took police to the location of the firearm. (App. p. 196). Forensics matched the bullet recovered from the scene with Petitioner's firearm. (App. p. 234). All of this evidence overwhelmingly points to Petitioner's guilt in these crimes.

Furthermore, Judge Burch's jury instructions cured any alleged impropriety in the solicitor's arguments. See Smith, 375 S.C. at 524, 654 S.E.2d at 532. Judge Burch instructed jury to consider only the testimony presented from the witness stand and the exhibits admitted into the record. (App. p. 269). He further instructed the jury it was the judge of the credibility of witnesses. (App. pp. 270-71). Finally, he instructed the jury

the statements of the attorneys were not evidence. (App. p. 272). Judge Burch's instructions were sufficient to cure any possible impropriety in the solicitor's comments. Id. Thus, the solicitor's comments could not have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 523, 654 S.E.2d at 532 (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)).

The record contains significant probative evidence the solicitor's comments were not objectionable. Thus, trial counsel was not ineffective for failing to object to them. Furthermore, no prejudice resulted from trial counsel's actions. Therefore, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
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3/3, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

The Honorable Steven H. John, Circuit Court Judge

HEYWARD DAVIS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari Pursuant To Austin V. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Carmen Ganjehsani
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 3rd day of March, 2014

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

March 3, 2014

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Heyward Davis, Jr. v. State of South Carolina**
Appellate Case No: 2012-212936

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari Pursuant To Austin V. State** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Appellate Defender Carmen Ganjehsani (2 copies)