

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County
Edgar W. Dickson, Circuit Court Judge

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JUN - 2 2014

S.C. Supreme Court

DERRICK TYRONE BLAKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001196

REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

In its Return to the Petition for Writ of Certiorari, the State does not address the merits of Petitioner's argument that his trial counsel was ineffective where he failed to object to the following remarks by Solicitor E.B. Springs during closing argument where these remarks impermissibly appealed to the passions of the jurors and played on the jurors' fear of the impact of drugs on our society:

He's in this for the money. It's all about him. It's not about the lives that the crack is going to affect. This isn't just about the addict. This is about the families; it's about the people they steal from, it's about the rent that doesn't get paid, the food that doesn't get put on the table and the electricity bill that doesn't get paid. It's about the clerk that gets robbed or shot.

App. 157, l. 21 – 158, l. 2.

The State's failure to address the merits of this improper closing argument is understandable given that these remarks were completely outside the bounds of the record of the case and any reasonable inferences to it. There is absolutely no justification for this argument by the Solicitor. See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and reasonable inferences to it").

These remarks by the Solicitor "invited the jury to convict [Petitioner], even if the evidence did not prove [his] guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs," an argument the appellate courts of this State have already deemed entirely improper. State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 747 (Ct. App. 1999).

Because the State cannot argue that the remarks were not improper, it has chosen to contend that the issue is unpreserved. The State's argument that the issue is not preserved for this Court's review is unfounded.

At the PCR hearing, Petitioner testified as to what statements he felt like his trial counsel should have objected to during the Solicitor's closing argument. Petitioner testified before the PCR court as follows:

Q: Can you read what statements you felt your attorney should have objected to?

A: "He said it is all about him. It is not the lives that the crack is going to affect. This is not about the [] family, the phone bills that are going to get paid. People that steal. The food not on the table. The electric bill that doesn't get paid. The clerk that will get shot by a robber. It has nothing to do with the case."

Q: And so your attorney didn't object obviously from this transcript?

A: No.

Q: And why do you feel like he should have objected?

A: Because he was making statements that were not in evidence for one and that is inflamed the passion of the jury. That was his personal opinions. He is interjecting his personal opinions in the closing arguments.

App. 227, l. 20 – 228, l. 12.

In its Order of Dismissal, the PCR court explicitly addressed trial counsel's failure to object to the Solicitor's closing argument. The PCR court observed that Petitioner had testified trial counsel "should have objected to the Solicitor's closing arguments as the [Petitioner] asserts the Solicitor's comments inflamed the jury, and the Solicitor also argued evidence not supported by the record." App. 299. The PCR court then went on to find that trial counsel "was not ineffective for [not] objecting to the Solicitor's closing argument

[where] the record and the evidence at trial support the Solicitor's version of the facts and the allowable inferences therefrom." Id. The PCR court finally found that Petitioner "failed to meet his burden of proving the outcome of his trial would have been different had [trial counsel] objected to the Solicitor's comments." The PCR court further ruled that the "Solicitor's comments did not infect the trial with unfairness as to make the [Petitioner's] conviction a denial of due process." The PCR court denied Petitioner's allegations that trial counsel was ineffective for failing to object to the Solicitor's remarks during closing argument. App. 300.

Petitioner's argument that trial counsel was ineffective for failing to object to the Solicitor's comments which impermissibly appealed to the passions of the jurors and played on the jurors' fear of the impact of drugs on our society was raised to and ruled upon by the PCR court. A Rule 59(e) motion under the South Carolina Rules of Civil Procedure was unnecessary to preserve the argument for appeal where the issue was raised to and ruled upon by the circuit court. See Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 493 (Ct. App. 2007).

The PCR court's Order of Dismissal explicitly addresses Petitioner's argument that trial counsel was ineffective for not objecting to the Solicitor's closing argument which contained comments which inflamed the jury and went beyond the evidence in the record. App. 298-300. This ruling by the PCR court is sufficient to preserve Petitioner's argument for this Court's review, and Petitioner was not required to file a Rule 59(e) motion to alter or amend the order to preserve the issue for appeal. See Spence v. Wingate, 381 S.C. 487, 674 S.E.2d 169 (2009) (holding that although a summary judgment order did not restate the

ground on which the petitioner opposed the summary judgment motion, the ruling in the appealed order was sufficient to address that argument).

Accordingly, where the issue relating to the Solicitor's improper comments which invited the jury to convict to keep the streets safe from drugs is preserved for this Court's review and where the State failed to challenge this issue on the merits, Petitioner is entitled to post-conviction relief and a new trial.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner Derrick Tyrone Blake respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of June, 2014.

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DERRICK TYRONE BLAKE,

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CERTIFICATE OF SERVICE

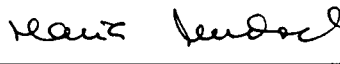
I certify that a true copy of the Reply to the Return to Petition for Writ of Certiorari in this case has been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick Tyrone Blake #332138, Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 2nd day of June, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR RESPONDENT

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

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.