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JUN - 3 2014

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Clifton Newman, Circuit Court Judge

JEFFERY T. LUCAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000455

PETITION FOR WRIT OF CERTIORARI

TOMMY A. THOMAS,
ATTORNEY FOR PETITIONER
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ISSUE PRESENTED

1. Whether the trial court correctly granted petitioner a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974).
2. Was Trial Counsel ineffective in failing to object to the statements made by the Assistant Solicitor in closing argument.

STATEMENT

Petitioner was originally indicted for assault and battery with intent to kill, but in March 2009, he was indicted in Lexington County for the same factual circumstances for infliction of great bodily injury upon a child. (App. 505, App. 435, lines 15-22) On March 16-18, 2009, petitioner was tried before the Honorable William P. Keesley and a jury. (App. 1) Lawrence G. Wedekind, Sara McMahon, and Michael D Ross represented the State. (App. 1) H. Wayne Floyd represented petitioner. (App. 1) The jury convicted petitioner. (App. 334, lines 19-24) Petitioner did not appeal.

On February 19, 2010, petitioner filed a PCR application. (App. 375) On April 25, 2012, a hearing was held before the Honorable Clifton Newman. (App. 432) Tommy A. Thomas represented petitioner. (App. 432) Kaelon E. May represented the State. (App. 432) On February 15, 2013, Judge Newman granted petitioner a belated appeal. (App. 492) Judge Newman denied petitioner's remaining PCR allegations. (App. 492) This petition follows:

ARGUMENT

The trial court correctly granted petitioner a belated appeal pursuant to *White v. State* 236 S.C. 110, 108 S.E.2d 35 (1974).

Judge Newman correctly granted petitioner a belated appeal. The PCR judge found that petitioner "did not knowingly and voluntarily waive his right to a direct appeal. (App. 501) Petitioner testified that he asked trial counsel to file an appeal. (App. 479, lines 5-7) Petitioner did not find out that trial counsel failed to file an appeal for him until he was allowed access to his family by the Department of Corrections. (App. 479, lines 8-20) Trial counsel testified that he felt an appeal "would have been a waste of money." (App. 450, lines 1-4)

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This case meets that standard. The PCR judge's ruling is supported by petitioner's testimony that he asked his attorney to file an appeal. Trial counsel admitted that he did not file an appeal. Therefore, this evidence supports the PCR judge's conclusion that petitioner is entitled to a belated appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

ARGUMENT II

Was Trial Counsel ineffective in failing to object to the statements made by the Assistant Solicitor in closing argument.

The Petitioner alleged at Post-conviction Relief that Trial counsel was ineffective for failure to object to statements made by the Solicitor in closing. He asserts these statements were impermissible and that these statements invoked the "Golden Rule" thus denied the Applicant a fair trial.

Counsel was asked on the stand about the multiple usage of the "you" in the Assistant

Solicitor's closing argument. And more specifically about the Assistant Solicitors statement "there was no surface blood that you would expect from the friction of the ---of the pain that you would have suffered to do that. (App. 293, lines 2-4) Trial counsel acknowledged the extensive use of the term "you". He stated that he did not think at that time that he (the solicitor) was referring to the Juror's individually. However, when asked if the statement "what pain you must have suffered" asked the Jurors to put themselves in the position of the child, Trial Counsel answered that "you could argue that". (App. 451, lines 6-9)

Trial counsel was further asked, did he feel that an objection would have been proper regarding a "Golden Rule" violation. Counsel responded that "I didn't object, so if I should have, I was ineffective. But no, I did not pick that up." (App. 451, lines 6-9).

Trial counsel did not realize that the word "you" was used 46 times in the closing. (App. 452, lines 14-17) When the Petitioner was asked about the Solicitor's closing argument, he testified that "If I was sitting over there and I heard it, I would have found me guilty too." (App. 478, lines 2-23) Petitioner further testified that "it took them away from looking at nothing but the evidence. It enhanced it." (App. 479, lines 1-4)

In this case, the Applicant must show that the Assistant Solicitor's comments so infected the trial with unfairness as to make the result and conviction a denial of due process. State v. Hamilton 344 SC 344, 543 SE 2d 586 (2001).

The "Golden Rule" argument is where the jurors are asked to put themselves in the position of a party, a victim's family member and decide the case from that perspective Von Dohlen v. State 360 SC 598, 602 SE2d 738 (2004).

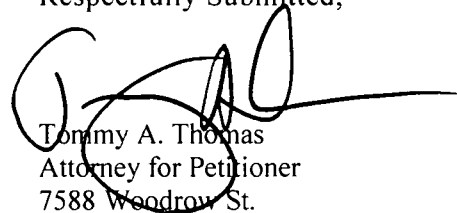
Such arguments are prohibited. These arguments encourage the Jury to depart from neutrality. The Petitioner asserts that the closing argument of the Assistant Solicitor asked the Jury

to put themselves in the shoes of the victim when he stated “what pain you must have suffered, ” a violation of the “Golden Rule”. This error was compounded by the repeated use of the work “you”. That the Prosecutor’s use of “you” or a form of “you” some 45 times in closing argument asking Jury to put themselves in place of the victim, constituted reversible error. State v. McDaniel, 320 SC 33, 462 SE 2d 882 (1995)

CONCLUSION

For these reasons, the Court should grant the petition and consider petitioner's belated appeal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', written over the typed name and address.

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June 3, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. Supreme Court

Clifton Newman, Circuit Court Judge

Case No.: 2010-CP-32-0803

Jeffery T. Lucas #333799..... Appellant,

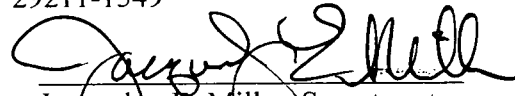
vs.

State of South Carolina.....Respondent.

CERTIFICATE OF SERVICE
BY MAIL

I, Jacquelyn E. Miller, Secretary to the Attorney for the Applicant, hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari with postage prepaid and the return address clearly shown on said envelope, to the Office of the Attorney General, at:

J. Walt Whitmire, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549



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Irmo, SC
June 3, 2014