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June 18, 2014

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RE: Timothy Wallace vs. State of South Carolina

Dear Mr. Shearouse,

Please find enclosed for filing, along with certificate of service, the original and seven copies of Petitioner's Petition for Writ of Certiorari and the original and one copy of the Appendix. If you could please clock in the extra copy of the Petition for Writ of Certiorari and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact our office.

Sincerely,

Jill A. Rider

Jill A. Rider
Paralegal

Enclosure

cc: Walter Whitmire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 23 2014
S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

CA No. 13-CP-37-290

TIMOTHY WALLACE, 3222985. ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent*.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether trial counsel rendered ineffective assistance of counsel when she failed to argue that the trial court judge should not allow Petitioner's prior conviction for drugs to be admissible as impeachment evidence since that evidence was clearly inadmissible under established South Carolina law?

II. Whether trial counsel rendered ineffective assistance of counsel when she did not object to the Solicitor's highly improper vouching for its law enforcement witnesses, to wit: they were not going to risk their reputations or jobs to lie to the jury, and the PCR court judge erred when he did not find that Petitioner was prejudiced by her substandard performance?

STATEMENT OF THE CASE

On September 17, 2007, Petitioner, after having rejected a plea offer of 4 years, was tried before the Honorable J.C. Nicholson, Jr. and a jury for trafficking in cocaine, more than 400 grams. He was found guilty, and sentenced to the mandatory minimum sentence of 25 years of incarceration. The passenger in the car with Petitioner, Herman Hood, has absconded from justice since he was released on bond.

Petitioner filed a timely notice of appeal, and Elizabeth A. Franklin-Best perfected the appeal. The South Carolina Court of Appeals affirmed his conviction and sentence. *State v. Wallace*, Op. No. 4800 (S.C. Ct. App. filed March 2, 2011). Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court. The Supreme Court granted certiorari on April 5, 2012, but then dismissed the appeal as improvidently granted. *State v. Wallace*, Op. No. 27203 (S.C. Court filed December 19, 2012).

Petitioner timely filed an application for post-conviction relief and raised the following claims: Prosecutorial Misconduct and Ineffective Assistance of Trial Counsel.[1] An evidentiary hearing was held on September 16, 2013 before the Honorable R. Lawton McIntosh. He was represented by Hugh Welborn, Esquire. Judge McIntosh filed an order of dismissal on December 16, 2013.

[1] The Order of Dismissal inaccurately states the claims as Ineffective Assistance of Plea Counsel: a. Failure to investigate and advise on the applicability of self-defense; b. Failure to advise Applicant to forego an immunity hearing and pled (sic) guilty, c. Failure to advise Applicant on the impact of collateral federal charges, d. Failure to file a notice of appeal. 2. Involuntary Guilty Plea: a. Applicant did not understand the charges or the waiver of his constitutional rights, b. Violation of Due Process: Applicant was not ensured a fair jury.

ARGUMENTS

Petitioner, Timmy Wallace, was travelling on I-85 in Oconee County, with his cousin, Herman Hood, when he was stopped by Corporal Thomas Crompton of the Oconee County Sheriff's Office for driving left of the center line. Crompton issued Petitioner a ticket, but continued to question him and Herman Hood about their trip to Atlanta. Crompton ultimately ran his service dog around the car Petitioner was driving, and the dog alerted on the driver's door and the trunk. Based on this, Crompton searched the car and pulled bags out of the back of the car. According to Crompton, Petitioner claimed ownership of the bag containing cocaine. At trial, Petitioner disputed this fact.

The main issue raised in Petitioner's direct appeal was the propriety of Officer Crompton's detaining him to conduct an investigation based on Crompton's "reasonable suspicion" that criminal activity was afoot. The Court of Appeals found that, "none of these items independently amounts to a reasonable suspicion of criminal activity" but that "blending each of these "tiles" into the "entire mosaic" of the totality of the circumstances," Crompton had reasonable suspicion to detain Petitioner while he walked the drug dog around the car. (citation) The Court of Appeals further found that Petitioner's argument regarding his statement claiming ownership of the bag was not preserved for review. *Id.* at 56, 455.

I. Trial counsel rendered ineffective assistance of counsel when she failed to argue that the trial court judge should not allow Petitioner's prior conviction for drugs to be admissible as impeachment evidence since that evidence was clearly inadmissible under established South Carolina law.

Petitioner testified at trial that he was travelling from Atlanta to Gastonia, NC with his cousin, Herman Hood. App. 202, l. 22- 203, l. 2. He testified that Hood provided the transportation. App. 203, l. 25- 204, l. 1. As he and Hood were leaving Atlanta, Petitioner grabbed

his bags, and Hood grabbed his own and placed them into the car. He did not search his cousin's bags, and did not have any reason to believe there was anything illegal in them. App. 205, ll. 2-23. Petitioner testified that he did not claim ownership of the bag containing the cocaine when Crompton removed it, but that Herman Hood did claim ownership. App. 205, l. 24- 206, l. 14. Herman Hood was released on bond after his arrest, and has since absconded.[2] The sole testimony attributing ownership of the bag to Petitioner was the testimony of Officers Crompton and Colgrove. In a swearing contest between the officers and Petitioner, Petitioner's credibility was critically important. For that reason, trial counsel's failure to move to have Petitioner's prior conviction for drugs suppressed prior to his taking the stand rendered her performance unreasonable and substandard.

Trial counsel elicited the following testimony:

Q: Mr. Wallace, have you ever been convicted of anything?

A: Yes, Ma'am, I have.

Q: And what have you been convicted of?

A: Conspiracy to Distribute Cocaine.

Q: And when was that?

A: In '99.

Q: And where was that?

A: That was in North Carolina.

Q: Did you have a trial on that charge?

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[2] The Oconee County Public Index reveals two entries for Failure to Appear on these charges, and a bond estreatment entry. *See* http://publicindex.sccourts.org/Oconee/PublicIndex/CaseDetails.aspx?County=37&CourtAgency=37001&Casenum=H984570&CaseType=C (*last visited*, May 28, 2014).

A: No, Ma'am. I pled guilty.

Q: Why did you plead guilty to that offense?

A: Because I was guilty.

Q: And you were sentenced?

A: Yes, ma'am.

Q: Did you serve any time in prison?

A: Yes, ma'am, I did.

Q: Are you currently on probation?

A: Well, not at the moment, but my probation ran out June 6th or June 19th of 2006.

App. 207, l. 11- 208, l. 5.

This testimony was wholly inadmissible, and Petitioner was prejudiced by his attorney's substandard performance.

This case falls squarely within the ambit of three other South Carolina Supreme Court cases, *State v. Bryant*, 369 S.C. 511, 633 S.E.2d 152 (2006), *Green v. State*, 338 S.C. 428, 527 S.E.2d 98 (2000), and *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

In this Court's 2006 case, *Bryant*, it affirmed that a trial court judge must conduct a balancing test to determine whether remote convictions are admissible under Rule 609(b), SCRE. A trial court judge should consider (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue. See *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling. *Id.* Specifically, the trial judge must articulate why the

probative value of the prior conviction outweighs its prejudicial effect. See *State v. Johnson*, 363 S.C. 53, 59-60, 609 S.E.2d 520 (2005). In Petitioner's case, trial counsel failed to urge the judge to conduct this balancing test, and just assumed his prior conviction was admissible. Had she urged the judge to perform the analysis, he would have excluded the state's use of the prior conviction for impeachment.

Violations of narcotics laws are generally not probative of truthfulness. See *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). And though this Court has declined to hold similar convictions inadmissible in all cases, an assessment of the factors outlined in *Colf* must be performed prior to admitting them. As this Court noted in *Green*, federal courts have held that prior convictions for the same or similar crimes are highly prejudicial and should be admitted sparingly. *Id.* at 432-33. *See* Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence §609.05[3][d] (2d ed. 1999). The Court also noted that the Fourth Circuit has been one of the stricter circuits, refusing to permit impeachment with similar prior convictions. *Id.* at 433. Here, the prejudicial effect of admitting the prior drug conviction cannot be understated. The critical issue was to whom the bag containing the drugs belonged. Petitioner argued that two law enforcement officers were mistaken when they attributed possession to him and not Herman Hood. Petitioner's credibility was the central issue the jury had to resolve, and the jury likely resolved doubts in the officers' favor given Petitioner's prior conviction for drugs.

Counsel's performance was additionally substandard because her eliciting this testimony opened the door to otherwise inadmissible testimony-- the State's introducing the videotape that contained Petitioner's discussing his prior drug conviction to police officers at the time of the stop. App. 241, l. 8- 242, l. 16. So, not only was the fact of Petitioner's prior drug conviction admitted

into evidence, but it was emphasized by the repetition of this fact to the jury during its deliberations.

In assessing this issue, the PCR court held:

> This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for erroneously allowing Applicant's prior conviction to be brought out during Applicant's trial testimony. This Court finds Applicant's testimony not credible. At the PCR hearing, Applicant testified he discussed the matter with trial counsel. Applicant testified that trial counsel advised him the benefits of testifying outweighed the detriments at the juncture in the trial. Trial counsel testified she discussed the matter with Applicant along with the trial judge advising Applicant of the exposure in testifying. This Court finds Applicant made a knowingly, intelligent, and voluntary decision to testify. Applicant's defense was mere presence although he operated the vehicle from which nearly two pounds of cocaine were discovered. This Court finds trial counsel's advice concerning Applicant's prior convictions did not influence Applicant's decision to testify. Therefore, this allegation is denied and dismissed.

App. 319.

The PCR judge misconstrued Petitioner's claim. At the PCR hearing the following exchange occurred:

> Q: Do you still stand by the allegation then that you were unaware that your prior drug conviction would be brought out if you testified?
>
> A: No, I'm not saying I was unaware. That's not what I'm saying. I'm saying that due to the fact that prior drug history was brought out, and when the jury saw the part of the videotape that was inadmissible, me saying that I have a prior drug conviction, that's what got me found guilty.

App. 289, l. 23- 290, l. 6.

The PCR court judge erred when he found that trial counsel did not render ineffective assistance of counsel, and that Petitioner was prejudiced by her substandard performance. The United States Supreme Court has set forth a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984);

Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Here, counsel did not argue a valid strategy for not urging the judge to find the prior conviction inadmissible. Instead, she unreasonably, and contrary to the law, assumed it was. Trial counsel rendered ineffective assistance of counsel, and Petitioner was prejudiced by her substandard performance. Petitioner respectfully asks this Court to grant his petition for writ of certiorari and ultimately reverse his conviction.

II. Trial counsel rendered ineffective assistance of counsel when she did not object to the Solicitor's highly improper vouching for its law enforcement witnesses, to wit: they were not going to risk their reputations or jobs to lie to the jury, and the PCR court judge erred when he did not find that Petitioner was prejudiced by her substandard performance.

During its summation, the assistant solicitor argued the following to the jury:

> "Not one officer said this, but two; two officers with combined more than 20 years' experience in law enforcement. They are not gonna put their reputation and their jobs on the line to come into court and tell you something that's not true, ladies and gentlemen; they're not gonna do it."

App. 218, l. 22- 219, l. 2.

The assistant solicitor's statements were improper, and trial counsel rendered ineffective assistance when she did not object to them. Petitioner was prejudiced by her failure to interpose an objection.

Regarding this claim, the PCR court held:

> "Applicant failed to meet his burden to prove trial counsel was ineffective for failure to object to the solicitor's comments during the closing argument. . . At the PCR hearing, trial counsel testified it did not occur to her [to] make an objection after the solicitor made the above mentioned comments . . . The Court finds the comments here constituted improper bolstering. See *State v. New*, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). This Court finds that any deficient performance by trial counsel here in not objecting did not [infect] the trial with unfairness. First,

> the dash-cam video recording of Applicant's arrest was submitted at trial. The recording captured the substance of the traffic stop and arrest. The jury was able to view the conduct and demeanor of the officers in assessing the credibility of the State's witnesses. Second, Applicant's conviction was supported by overwhelming evidence of guilt. Therefore, this allegation is denied and dismissed."

App. 320.

The PCR court judge incorrectly found that trial counsel did not render ineffective assistance of counsel by failing to object to the improper bolstering of law enforcement, even though the comments do constitute improper bolstering. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Additionally, a prosecutor cannot vouch for a witness's credibility. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E. 2d 805, 818 (2001). A prosecutor improperly vouches for a witness's credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. *Id.* Here, the solicitor's remarks improperly vouched for the officers' credibility by suggesting that they would experience personal embarrassment or job loss if they failed to testify truthfully in Petitioner's trial. Jurors might even infer that the officers would lose their pensions if they lied at trial. All of this is well beyond the record and improperly invaded the jurors' province of determining witness credibility.

Additionally, it cannot be argued that defense counsel invited the assistant solicitor's improper response. Trial counsel's closing argument suggested that the officers' belief that Petitioner was the owner of the bag was the result of a mistake, and not a product of deliberate deception. App. 215, ll. 2-6.

Even if this Court construes the comments to be an invited response to the defense, "the relevant question in determining if a defendant's rights were violated is whether the solicitor's

comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' *Vaughn v. State*, 362 S.C. 163, 607 S.E.2d 72 (2004) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). In *Darden v. Wainwright*, 477 U.S. 168, 182 (1986), the United States Supreme Court held that comments by a solicitor failed to meet the test set out in *Donelly* because 1) the comment was an "invited response" to defense counsel's argument, 2) the evidence against the defendant was overwhelming, and 3) the trial court instructed the jury several times that its decision was to be made on the basis of evidence alone and the arguments of counsel were not evidence. In Petitioner's case, not only did trial counsel not invite the improper comments by the assistant solicitor, but the only evidence tending to prove the State's case came from the officers themselves. This is far from a case of overwhelming guilt, and the PCR judge erred when he found otherwise. Additionally, the trial court judge did not engage in any superlative efforts to remind the jurors that statements of counsel are not evidence. Given the impropriety of the statement, the lack of strong evidence of guilt, and the absence of judicial prophylactic statements, this Court should grant Petitioner's petition for writ of certiorari and ultimately reverse his conviction.

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant his petition for writ of certiorari and allow full briefing on the issues.

Respectfully submitted,

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June 18, 2014.

THE STATE OF SOUTH CAROLINA
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APPEAL FROM OCONEE COUNTY
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R. Lawton McIntosh, Circuit Court Judge

Case No. 2013-CP-37-290

Timothy Wallace, #222985 . . . . . .Petitioner,

v.

State of South Carolina. . . . . Respondent.

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the Respondent one (1) copy of Petitioner's Petition for Writ of Certiorari and Appendix in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Walt Whitmire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 18th day of June, 2014, in Columbia, South Carolina.

Jill A. Rider

JILL RIDER