

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No, 2014-002006

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S.C. Supreme Court

Mark R. Bolte,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

- I. Did the Court of Appeals properly affirm that Counsel was not ineffective for not objecting to the solicitor's comments during the closing argument and the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to the solicitor's closing argument?

STATEMENT OF THE CASE

Mark R. Bolte, ("Petitioner"), was indicted at the October 2003 term of the Abbeville County Grand Jury for Incest, Committing or Attempting to Commit a Lewd Act upon a Child under Sixteen Years of Age, and Criminal Sexual Conduct With a Minor – first degree, and two counts of Criminal Sexual Conduct With a Minor-second degree (2003-GS-01-296). E. Charles Grose, Esquire, represented Petitioner. On September 7-10, 2004, Petitioner proceeded to trial on three of the aforementioned charges: Incest, one count of Criminal Sexual Conduct with a Minor-Second degree, and Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen Years of Age. The jury convicted the Petitioner of those charges as indicted. The Honorable Wyatt T. Saunders, Jr., sentenced Petitioner to confinement for a period of twenty years for the criminal sexual conduct charge, fifteen years for the lewd act charge, and ten years for incest, all sentences running consecutively.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). Petitioner also filed a *pro se* Anders response brief. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Bolte, Op. No. 2009-UP-361 (filed June 24, 2009). Petitioner then filed a *pro se* Petition for Rehearing, which the Court of Appeals denied on August 25, 2009. The Remittitur was also issued on August 25, 2009.

Petitioner subsequently filed an application for post-conviction relief (PCR) on December 23, 2009. Respondent made its Return on April 16, 2010. On October 27, 2010, an evidentiary hearing was held at the Newberry County Courthouse. Petitioner was present and represented by John E. Newlon, Esquire. Respondent was represented by Jennifer A. Kinzeler, Esquire of the South Carolina Attorney General's Office. On January 20, 2011, the Honorable Eugene C.

Griffith, Jr. denied and dismissed Petitioner's application with prejudice by written Order. Petitioner, through Counsel, Wanda H. Carter, Esquire, subsequently filed a Petition for Writ of Certiorari. Respondent, through Counsel, J. Rutledge Johnson, Esquire, filed a Return to the Petition for Writ of Certiorari on January 27, 2012. The Court of Appeals granted certiorari on September 18, 2013. Petitioner filed its Brief of Petitioner on November 18, 2013. Respondent filed its Brief of Respondent on January 30, 2014. Oral argument was held at the Court of Appeals on June 5, 2014. On June 30, 2014, the Court of Appeals affirmed the lower court's findings. Petitioner filed a petition for rehearing on July 15, 2014. This petition was denied on August 20, 2014. Petitioner filed a Petition for Writ of Certiorari with this Court on September 19, 2014. This Return to Petition for Certiorari follows.

ARGUMENT

- I. **The Court of Appeals properly affirmed that Counsel was not ineffective for not objecting to the solicitor's comments during the closing argument and Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to the solicitor's closing argument.**

Petitioner asserts the Court of Appeals erred by affirming the PCR court's findings that Counsel was not ineffective for not objecting to the solicitor's comments in her closing argument. The Court of Appeals correctly affirmed the PCR court's ruling that Counsel was not ineffective for not objecting to the solicitor's closing argument because these comments was proper, and the Petitioner failed to meet his burden of proving any resulting prejudice.

In a PCR action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Petitioner must prove counsel's performance was deficient.

Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

During her closing argument, Assistant Solicitor Suzanne Mayes ("Solicitor") made the following comments regarding the testimony provided by both the State and the defense:

...I submit to you ladies and gentlemen that throughout this case, from the witnesses supplied by the State and the witnesses supplied by the defense, the facts of this case are undisputed. One thing stands like stone. He did it and there is no other reasonable explanation for why we're here.

(App. 529, ln. 23- App. 530 ln. 4).

At the PCR hearing, the solicitor testified her use of the word 'undisputed,' while referencing the facts of the case, "was not a comment on Mr. Bolte not testifying. That was a reference to the numerous witnesses presented throughout the case by both the State and then the witnesses offered by the defense and the fact that the testimony did corroborate the victim's account." (App. p. 655 ln. 24- App. p. 656 ln. 3).

The solicitor further explained while she did not qualify the term "undisputed" during her initial closing argument, she did qualify it during her subsequent closing argument.

On that particular segment [during the first closing argument] it was very broad and I did not [qualify "undisputed"]. However, [during the second closing argument] I did. When I used the same term, undisputed, I stated when we talk about Mark Bolte and his control and isolation of [Victim] it is undisputed in this case. [Victim's] mom called by the defense as a defense witness confirmed every aspect of that.

(App. p. 663 ll. 16-22).

“A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). “If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.” State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999)

The Court of Appeals correctly affirmed the PCR Court's holding that the solicitor's comments were proper in context with the evidence that was presented at trial. The PCR court explained “[t]he solicitor's remark that the facts of this case were “undisputed” was based on her version of the testimony presented by the State and the defense, rather than a suggestion that the Applicant was under any duty to testify.” (App. p. 761). Additionally, the PCR court held “[t]he solicitor's comment did not refer to the Applicant's right to or failure to testify in any way.” (App. p. 762). Furthermore, the PCR court was able to judge the credibility of the witnesses presented at the hearing, including Ms. Mayes, and properly found “[i]t is clear from a review of the entire record, which the PCR court had before it, that the solicitor's remark was a clear reference to the defense's witnesses whose testimony did not dispute the testimony and evidence presented by the State.” (App. p. 761-762). Petitioner fails to address this testimony in his petition which is clearly part of the record that the Court of Appeals and the PCR court considered in making their respective decisions. Petitioner's argument that the solicitor's closing argument directly commented on Petitioner's right to remain silent is taken completely out of context and is contradictory to the testimony provided by the solicitor at the PCR hearing. Therefore, Petitioner's argument is in error and this comment was proper in context of the case and the entire record.

Moreover, even assuming *arguendo* the comment was improper, the Court of Appeals correctly affirmed the PCR court's holding that the trial court eliminated any prejudice to Petitioner with its instructions to the jury concerning the Petitioner's right to remain silent.

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument..." State v. Simmons, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The trial court stated "it is emphasized to you that the fact that a defendant does not testify on his own in a criminal trial is not a factor to be considered by you in any way in your deliberations." (App. 586) The trial court also explained:

A defendant has the constitutional right to remain silent. The assertion of that constitutional right cannot and must not be considered by you in your deliberations. Under your oath, then, you are to draw no inference and reach no conclusions whatsoever from the fact the defendant in this case did not testify.

(App. p. 587). Furthermore, the trial court again instructed: "it's emphasized to you that the facts a defendant does not testify is not a factor to be considered by you in determining the guilt or innocence of a defendant or in any other aspect of your deliberations." (App. p. 587). Clearly, the trial court's instructions stressed the jury's inability to use the Petitioner's right to remain silent against him and cured any potential error on the part of the solicitor. Thus, the Court of Appeals correctly affirmed the PCR court's holding that "any prejudice caused by the solicitor's remarks was eliminated by the trial judge's instruction to the jury prior to deliberation, which emphasized... that [Petitioner's] decision to exercise his constitutional right not to testify was not a factor to be considered by them." (App. p. 762).

Accordingly, there is clear “evidence of probative value” to support the Court of Appeals affirmation of the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the Court of Appeals and the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
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By:



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October 24, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

MARK R. BOLTE,

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**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Wanda H. Carter
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 24th day of October, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

October 24, 2014

VIA HAND DELIVERY

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

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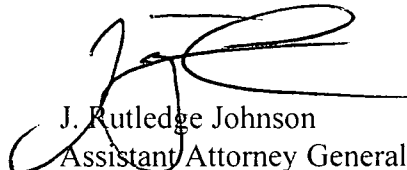
S.C. Supreme Court

RE: Mark R. Bolte v. State of South Carolina
Appellate Case No: 2014-002006

Dear Mr. Shearouse:

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

Sincerely,


J. Rutledge Johnson
Assistant Attorney General
Bar No: 78871

JLT/nb
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)