

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 12 2015

S.C. Supreme Court

Certiorari to Greenville County

James R. Barber, III, Circuit Court Judge

CARDELLE WASHINGTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002251

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION7

ISSUE PRESENTED

Trial counsel erred in failing to object to the portion of the solicitor's closing argument that referred to the testimony of two codefendants as true because this was impermissible bolstering that resulted in prejudice to petitioner's case.

STATEMENT

Petitioner Cardelle Tyrone Washington was convicted of armed robbery, possession of a weapon during the commission of a violent crime, second degree burglary, and two counts of kidnapping during the December 2010 term of the Greenville County General Sessions Court before Judge C. Victor Pyle, Junior. Randy Chambers represented petitioner at trial, and Assistant Solicitor Lauren D. Price appeared on behalf of the state. App 1-231. Petitioner was sentenced to imprisonment for a period of an aggregate term of thirty years.

Petitioner appealed, but his appeal was dismissed on February 20, 2013, by the South Carolina Court of Appeals. See State v. Washington, Op. No. 2013-UP-079 (S.C. Ct. App. filed February 20, 2013). Breen R. Stevens, formerly of the Office of Appellate Defense, represented petitioner on direct appeal.

On August 2, 2013, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App 233-241. The respondent filed a return dated April 8, 2014, requesting that a hearing be held in response to petitioner's PCR action. App. 242-246.

A PCR hearing was convened on August 28, 2014, at the Greenville County Courthouse before Judge James R. Barber. App. 248-288. Petitioner was present at the hearing and represented by Mills Arial, and Assistant Attorney General Karen Ratigan appeared on behalf of the state.

On September 24, 2014, Judge Barber issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 291-299. Petitioner appealed Judge Barber's Order of Dismissal in the case. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the portion of the solicitor's closing argument that referred to the testimony of two codefendants as true because this was impermissible bolstering that resulted in prejudice to petitioner's case.

Petitioner was charged with breaking into a Greenville County Burger King restaurant after hours on the night of April 25, 2006. Petitioner and company allegedly entered the Burger King while employees Gladys Harrison and Douglas Ashmore were closing up, took money from the register drawers, and then fled. Police officers Gerald Sims and Chiman Blair were dispatched to the crime scene on the night in question and learned that three perpetrators were involved in this incident. App. 32, 1.4 – p. 37, 1.19; App. 42, 1.3 – p. 46, 1.25.

Employee Gladys Harrison stated that she was counting money from the register drawers when the break-in occurred, and that a man holding a gun approached and asked for the money. Harrison stated that she pointed to the money in the drawers and ran out of the restaurant. Harrison added that there was another man who stood at the door and tried to grab her shirt as she ran away, but that she managed to escape. App. 49, 1.5 – p. 55, 1.24. Employee Douglas Ashmore testified that he heard the glass shatter when the men burst through the door and that two of the men “controlled [him]” while one went into the office where Harrison was counting money. App. 73, 1.9 – p. 85, 1.6.

Co-defendant Andrew White testified on behalf of the state and admitted that he and co-defendant Quentin Sullivan and petitioner committed the crimes in the case. White testified that he and Sullivan and petitioner were riding around on April 25, 2006, when they passed by Burger King on Pleasantburg Drive and “decided to get some quick cash.” White explained that he busted through the glass of the front door of the Burger King and that petitioner went in first, and then he

(White) went in next, and that Sullivan came in last. White stated that petitioner held a gun and that Sullivan held a steel pipe. White claimed that petitioner jumped the counter and subdued the female employee behind the counter and that he and Sullivan went to the back kitchen area to subdue the male employee. White added that after the money was confiscated, they fled and later divided the money between them. App. 90, 1.14 – p.108, 1.12. The state offered into evidence the statement of codefendant Sullivan, which verified White's recollection of the events in the case. **However,** codefendant Sullivan gave testimony at trial denying petitioner's participation in the crimes. App. 128, l. 1 - p. 136, l. 10.

Petitioner did not testify at trial.

During the PCR hearing, petitioner testified in effect that trial counsel erred in failing to object to the solicitor's improper bolstering argument at closing regarding the truthfulness of the testimony of the state's witnesses in the case. App. 265, lines 16-19; App. 266, 1.7 – p. 268, 1.13.

The solicitor's specific closing comments follow:

Now, also look at the consistency that Andrew White had with Quentin Sullivan....I urge you to read their statements when you are back deliberating moments from now. Quentin Sullivan had no way of knowing what Andrew White was going to say that day. Andrew White had no way of knowing what Quentin Sullivan was going to say....they briefly gave their statements to Detective Conroy. You heard they were not threatened or coerced in any way or promised anything....How would lying have helped them? How would lying help them? If they got caught in a lie, they wouldn't be gaining anything. And they haven't been promised anything. So they were telling the truth in the statements that they gave that day. [Petitioner] was with them that night. [Petitioner] did everything [Sullivan and White said] that he did...

Ladies and Gentlemen, we didn't pick Andrew White or Quentin Sullivan as witnesses in this case. The Defendant did. He picked them because they are his friends and they are his co-conspirators... I want you to consider who has a dog in this fight. Andrew Washington [sic] doesn't have a dog in the fight. He can't gain anything for testifying today. Why would he lie? Why would he

continue to tell a story, if it were a story, four years later? He has nothing to gain. Now, everyone should be culpable for their own actions. Mr. White has accepted responsibility for his actions. Even Mr. Sullivan has accepted responsibility for his actions. Today it's up to you to hold Cordelle Washington accountable for his actions. App. 187, l. 8 – p. 189, l. 2.

The PCR judge ruled that petitioner failed to meet his burden of proving that trial counsel should have objected during [the solicitor's] closing argument because the solicitor was allowed to state his version of the facts and comment on the weight to be given to the testimony presented at trial. App. 296-297.

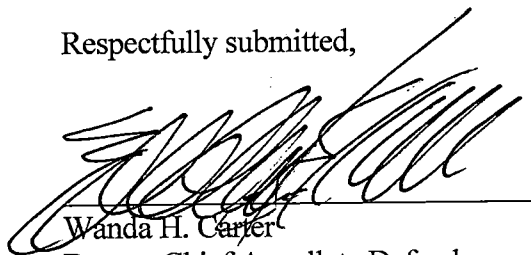
As a rule, a solicitor cannot describe the testimony of the state's witnesses as "true" as this would constitute improper vouching. Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. In other words, improper vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration. By telling the jury that the state's witnesses' testimony was "true," the solicitor directly assured the jury that she should be believed over petitioner. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001); State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). Here, petitioner was prejudiced by the comments that were tantamount to improper bolstering in the case because neither of the two employees that were the present during the crimes were able to give in-court or out-of-court identifications in the case. Thus, the case hinged on the testimony of codefendant White and the statement of codefendant Sullivan (note that codefendant Sullivan did not testify to petitioner's involvement in the crimes at trial); and therefore, the improper bolstering that gave credibility to White's testimony and Sullivan's statement unfairly prejudiced petitioner's case at trial.

Clearly, counsel erred in failing to object to the solicitor's improper bolstering argument made at closing because the omitted objection constituted ineffective assistance of counsel at trial, which in turn violated petitioner's Sixth Amendment right to effective assistance of counsel in his criminal case. See Strickland v. Washington, 466 U.S. 668 (1984). Moreover, counsel's error prejudiced the defense because but for the omission, the outcome of petitioner's trial might have been different since petitioner did not testify at trial and the state's case hinged solely on the codefendants' testimony and statement, which the solicitor erroneously touted as true at closing.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant this petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

James R. Barber, III, Circuit Court Judge

CARDELLE WASHINGTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Cardelle Washington #290074, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 12th day of June, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of June, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.