

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-002251

Cardelle T. Washington, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether 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 OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the November 2010 term of General Sessions for armed robbery (2008-GS-23-1671, count 1), possession of a weapon during commission of a violent crime (2008-GS-23-1671, count 2), second-degree burglary (2008-GS-23-1672), and two counts of kidnapping (2008-GS-23-1673, counts 1, 2). (App.pp.300-05). Randall L. Chambers, Esquire represented Petitioner.

After the State brought the case to trial, Petitioner was found guilty. On December 8, 2010, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of 30 years for armed robbery, 5 years for possession of a weapon during commission of a violent crime, 15 years for second-degree burglary, and 30 years for each count of kidnapping. (App.p.231).

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Washington, Op. No. 2013-UP-079 (S.C. Ct. App. filed February 20, 2013). The Remittitur was sent on March 15, 2013.

Petitioner filed an application for post-conviction relief (PCR) on August 2, 2013 (2013-CP-23-4177). (App.pp.233-41). A hearing was held at the Greenville County Courthouse on August 28, 2014. (App.pp.248-88). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable James R.

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Barber, III denied relief in an order filed October 10, 2015. (App.pp.291-99).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

Petitioner argues trial counsel should have objected during the State’s closing argument because the assistant solicitor made “an improper bolstering argument.” (Pet. Cert., p.7). This argument is without merit.

A.

At trial, the victims testified three men entered a Burger King while wielding weapons, forced one employee to the ground, took money from the establishment, and then fled. (App.pp.51-54; p.67; pp.75-79). One of Petitioner’s co-defendants, Andrew White, had previously pled guilty to this armed robbery and testified at Petitioner’s trial. White corroborated the victims’ testimony and stated he, Quentin Sullivan, and Petitioner robbed the Burger King and split the money they stole. (App.pp.94-105). Sullivan (who had also previously pled guilty to this armed robbery) also testified as a State witness but denied participating in this robbery. (App.p.130; pp.134-35). Sullivan was declared a

hostile witness and his two statements to law enforcement (in which he admitted his participation) were admitted into evidence. (App.pp.130-36). During closing argument, the assistant solicitor stated the following:

Now, also look at the consistency that Andrew White had with Quentin Sullivan. You heard his statement. Detective Conroy read it into evidence. You can look at it again. I urge you to. 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.

Now, they briefly gave their statements to Detective Conroy. You heard they were not threatened or coerced in any way or promised anything. When they gave their statements, perhaps they hoped that their cooperation would help, that Detective Conroy would at some point go to bat for them or talk to a Solicitor or to a judge about leniency. 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. He did everything they say that he did.

Ladies and Gentlemen, we didn't pick Andrew White or Quentin Sullivan as witnesses in this case. [Petitioner] did. He picked them because they are his friends and they are his co-conspirators. I would love to have a rabbi or a pastor or a bank president or a school teacher to stand up in front of you and testify in a case like this, but I don't. 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 [Petitioner] accountable for his actions. Today is [Petitioner]'s day in court, no one else's. It's time to hold him accountable for what he's done.

(App.p.187, line 8 – p.189, line 5).

B.

At the PCR hearing, Petitioner argued the assistant solicitor's comments in closing argument were prejudicial because "basically she's saying to the jury, I expected Andrew White and Quinton [sic] Sullivan to come and testify on my behalf, to lie for me, so that I would avoid any more time in SCDC." Petitioner specifically noted page 188, lines 8-12 of the trial transcript² and argued – in general – that the assistant solicitor said "how could lying help them if they were, in fact, telling a lie on me." (App.pp.266-67).

In denying Petitioner's application for post-conviction relief, the PCR judge found "there was no meritorious objection to be made" to the assistant solicitor's statement on page 188, lines 8-12. The PCR judge also noted arguments to the jury do not constitute evidence and that an attorney is allowed to comment on the weight testimony ought to be given. (App.pp.296-97).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v.

² "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."

State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner did not meet his burden of proving trial counsel should have objected to the assistant solicitor’s closing argument. Trial counsel was not deficient in failing to object during the assistant solicitor’s closing argument because there was nothing objectionable. A prosecutor is allowed to give her version of the testimony and comment upon the weight to be given such testimony. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). Furthermore, the assistant solicitor’s closing argument was permissible because it did not include a comment regarding credibility or that she believed witnesses and the jury should believe them. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (“A prosecutor improperly vouches for a witness’ 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.”); Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (“Improper vouching occurs when the prosecution places the government’s prestige behind a witness by making explicit personal assurances of a witness’ veracity. . . .”). Rather, the assistant solicitor merely noted in her closing argument that White and Sullivan gave truthful statements to police and were not motivated to lie. The assistant solicitor’s remarks in closing argument were unsurprising, as Sullivan denied involvement in the crime at trial and was declared a hostile witness.

See Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (“A solicitor may argue the credibility of the State’s witnesses if the argument is based on the record and its reasonable inferences.”). Our courts have found far more overt examples of the State’s attorney commenting on actions or intentions of a witness did not constitute improper bolstering of a witness. See, e.g., State v. Shuler, 344 S.C. 604, 631, 545 S.E.2d 805, 819 (2001) (finding the State did not bolster the witness in questioning him about whether his plea agreement required him to tell the truth); State v. Copeland, 278 S.C. 572, 579-80, 300 S.E.2d 63, 68 (1982) (finding State’s comment in closing argument that a key witness would still have to serve 20 years in prison did not bolster that witness); State v. New, 338 S.C. 313, 320-21, 526 S.E.2d 237, 240-41 (Ct. App. 1999) (holding the State’s remarks referring to a key witness as a “snitch” did not impermissible bolstering). As the assistant solicitor did not vouch for a witness or bolster testimony, trial counsel was not remiss in not objecting during closing argument.

D.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in interagency mail and addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 20th day of July, 2015.


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