

ORIGINAL

RECEIVED

JAN 08 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

DAVID ROY LYNCH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001874

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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

ARGUMENT5

CONCLUSION8

PETITION TO BE RELIEVED AS COUNSEL.....9

ISSUE PRESENTED

Whether the record supports the PCR court's conclusion that trial counsel was not deficient in failing to object when the solicitor argued in closing that Petitioner's codefendant had pled guilty to the same charges under the theory of the-hand-of-one-is-the-hand-of-all where the record only disclosed that the codefendant had pled guilty and not that the plea was under a specific theory of liability and where Petitioner's defense was that he was merely present and not an accomplice.

STATEMENT

On August 25, 2005, the Spartanburg County Grand Jury indicted Petitioner David Roy Lynch for murder, assault and battery with intent to kill, and armed robbery. App. 499—App. 504. On January 8, 2007, Petitioner proceeded to trial before The Honorable J. Derham Cole and a jury. Scott Robinson represented Petitioner and Derrick Balsa represented the State. App. 1.

The State alleged that on December 30, 2004, Petitioner was riding in a car through a residential area of Greer with some friends looking for drugs. As the car approached a man parked in the street talking on the phone, Petitioner and a codefendant, Antwon Salters, got out of the car, walked to the parked car, and shot the man inside while robbing him of a cell phone and ring. A bystander attempting to flee was also shot. App. 107, line 5—App. 109, line 19. Petitioner's defense was that he was merely present with Salters and had no intention, plan, or responsibility for the shootings. App. 453, lines 15-23. In his opening statement, Petitioner's trial counsel told the jury that Salters was solely responsible for shooting the victims, and he had already pled guilty to the murder, robbery, and assault and battery. App. 111, lines 6-13.

The State adduced no eyewitness or forensic evidence showing Petitioner fired a gun at either victim. Evidence was presented that Salters told a witness he shot the deceased victim. Evidence was also presented that Petitioner voluntarily approached the police to cooperate, including by leading them to areas around the shooting where evidence was discarded. App. 208, lines 13-20; App. 243, lines 9-14; App. 269, line 1—App. 270, line 11. In her closing argument, the Solicitor for the State argued to the jury that whether or not Petitioner pulled the trigger, he was guilty under the theory of hand-of-one-is-the-hand-of-all. She then told the jury, "Antwon Salters pled guilty, as Mr. Robinson told you in his opening, under the theory of the-hand-of-one-is-the-hand-of-all." Petitioner's trial counsel did not object. App. 329, lines 4-18.

At the conclusion of trial the jury found Petitioner guilty as charged, and the trial judge sentenced to him to life in prison for murder; thirty years' concurrent imprisonment for assault and battery with intent to kill; and twenty years' concurrent imprisonment for armed robbery. App. 386, lines 6-19; App. 389, line 14—App. 390, line 21.

On December 12, 2011, Petitioner filed a petition for post-conviction relief claiming ineffective assistance of counsel. App. 392—App. 398. The State filed a return on September 11, 2012. App. 399—App. 404. On March 25, 2015, Petitioner proceeded to an evidentiary hearing before The Honorable Roger L. Couch. Leah B. Moody represented Petitioner and Suzanne White represented the State. App. 405.

Petitioner testified that early on in his case, he was dissatisfied with trial counsel's performance and sought in vain for the chief administrative judge to substitute him. App. 416, lines 11-17. He testified that he and trial counsel discussed how Salters knew the deceased victim—who was romantically involved with Salters' girlfriend—and how Petitioner had no motive to shoot the decedent. App. 417, lines 5-23. He believed trial counsel was deficient in failing to object to the Solicitor's argument in closing that Petitioner was guilty because Salters pled guilty. App. 431, line 21—App. 432, line 5. Trial counsel then testified as to why he did not object:

There's only a few things that I would object to in a closing argument. If he's gonna be disparaging Mr. McDowell or myself, trying to shift the burden and so forth, putting in facts that weren't in evidence, things, improper. That was not improper by Mr. Balsa because that was something that was talked about during the trial. It may not of [sic] been talked about a bunch, but it was part of it.

App. 456, line 24—App. 457, line 5.

On August 17, 2015, the PCR judge issued an order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 492—App. 498. Specifically, the judge

noted that “several witnesses testified about Salters through the trial” and “the assistant solicitor is permitted to comment upon the trial testimony.” App. 496.

ARGUMENT

The PCR judge erred in ruling that the Solicitor’s statement in closing that “Salters pled guilty . . . under the theory of the-hand-of-one-is-the-hand-of-all” was permissible because nothing in the record shows that Salters represented in any way that he was guilty as an accomplice rather than as a lone agent.

The PCR judge erred in ruling that the Solicitor’s statement in closing that “Salters pled guilty . . . under the theory of the-hand-of-one-is-the-hand-of-all” was permissible because nothing in the record shows that Salters represented in any way that he was guilty as an accomplice rather than as a lone agent. The PCR judge therefore erred in concluding trial counsel was not deficient for failing to object. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created 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 defendant. *Id.* at 687. “The validity of counsel’s strategy is reviewed under ‘an objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)).

A solicitor’s closing argument “must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” *Von Dohlen v. State*, 360 S.C. 598, 609-10, 602 S.E.2d 738, 744 (2004); *see also Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (“[A]lthough we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this ‘strategy’ cannot be construed as a valid one given the

evident impropriety of the solicitor's remarks.”); *Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003).

In this case, the Solicitor’s statement in closing that “Salters pled guilty . . . under the theory of the-hand-of-one-is-the-hand-of-all” was not permissible because nothing in the record shows that Salters represented in any way that he was guilty as an accomplice rather than as a lone agent. Indeed, based on the record’s lack of evidence showing Salters and Petitioner acted as accomplices with a common plan, Petitioner’s trial counsel adopted the defense that Salters acted alone in shooting the victims, and Petitioner was merely present at the scene. Accordingly, in his opening statement trial counsel implied to the jury that Salters had already taken all allocable responsibility for the crimes by pleading guilty. Not only did the solicitor in her closing misrepresent the record, but she also misrepresented Petitioner’s very position on the matter by saying that trial counsel admitted in his opening that Salters had pled under the theory of the-hand-of-one-is-the-hand-of-all.

Furthermore, although trial counsel attempted to articulate a valid trial strategy for failing to object, his reasoning was insufficient for two reasons. First, he plainly stated that his practice was to object in closing “[i]f [a solicitor is] gonna be . . . putting in facts that weren’t in evidence.” Second, as stated in *Brown v. State*, such a strategy could not be valid given the evident impropriety of the solicitor's remarks.

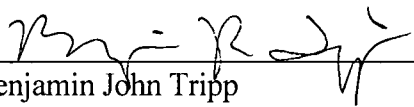
While the records contains reports that Salters pled guilty, none specifically shows that Salters represented in any way that he was guilty as an accomplice rather than as a lone agent. The PCR judge’s statement in the order of dismissal that the testimony of several witnesses at trial established as much was unsupported, and therefore, contrary to the PCR judge’s ruling, the

solicitor was not permitted to argue the point in her closing. Trial counsel was deficient for failing to object to her argument, and this Court should reverse.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of January, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROGER L. COUCH, CIRCUIT COURT JUDGE

DAVID ROY LYNCH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001874

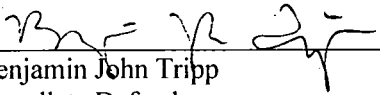
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Roy Lynch states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on March 25, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for David Roy Lynch.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of January, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

DAVID ROY LYNCH,

PETITIONER,

V.

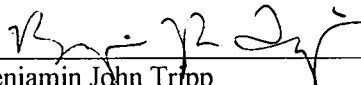
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001874


CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire and David Roy Lynch, #270223, at McCormick Correctional Institution this 8th day of January, 2016.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of January, 2016.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.