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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

Honorable Brooks P. Goldsmith, Circuit Court Judge

KASHIF POITEIA NASH

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000290

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to object to that portion of the solicitor's closing argument that vouched for the credibility of Deputy Suber?

STATEMENT

Petitioner was convicted of possession of cocaine and habitual traffic offender after a jury trial held before the Honorable Lee S. Alford in Union County on February 4-5, 2014. Petitioner was sentenced to respective sentences of six (6) years and five (5) years. Ricky Harris, Esquire was trial counsel. Blaine Fleming, Esquire was the assistant solicitor. (App. p. 1 – p. 321)

Petitioner appealed his convictions but he decided to drop his appeal. He filed an application for post-conviction relief on October 7, 2014. (App. p. 322 – p. 330) Respondent filed a return dated February 10, 2014. (App. p. 331-335) An evidentiary hearing was held on November 3, 2016, before the Honorable Brooks P. Goldsmith. Petitioner was present and was represented by Leah Moody, Esquire. Justin Hunter, Assistant Attorney General represented respondent. Both petitioner and trial counsel testified at the hearing. (App. p. 336-410) On December 28, 2015, Judge Goldsmith issued an order denying and dismissing the application for post-conviction relief. (App. p. 411 – p. 420)

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to object to that portion of the solicitor's closing argument that vouched for the credibility of Deputy Suber.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

In this case the relevant portion of the solicitor's closing argument was as follows:

So if it just comes down to which person do you believe, I submit to you Deputy Suber certainly has no reason to risk

his job and his freedom to come here and swear under oath that he had seen Mr. Nash drive the car if he didn't see Mr. Nash drive the car. He knows Mr. Nash. He has known him for years. He knows his entire family. He sees them every other week at church. He has had conversations with him about driving and his driver's license status. He would not be mistaken.

(App. p. 286, line 23 – p. 287, line 7)

Defense counsel did not object. In Matthews v. State, 350 S.C. 272, 565 S.E. 2d 766 (2002), in a similar case, a defense attorney was held ineffective for failing to object to a solicitor's closing argument that vouched for the credibility of a State's witness. The Court wrote:

The solicitor's statement is improper. A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). A solicitor may not vouch for the credibility a State's witness based on personal knowledge or other information outside the record. *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to a jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. *Id.* It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on the evidence in the record. *Id.*

The solicitor's summation led the jury to believe the government corroborated the witness' testimony before trial and found it credible. The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence. The solicitor improperly vouched for the witness.

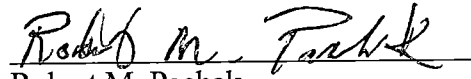
350 S.C. at 276-277, 565 S.E.2d at 768.

Defense counsel should also be held ineffective in this case.

CONCLUSION

Petitioner's convictions should be reversed as a result of ineffective assistance of counsel.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County
Honorable Brooks P. Goldsmith, Circuit Court Judge

KASHIF POITEIA NASH

PETITIONER,

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RESPONDENT

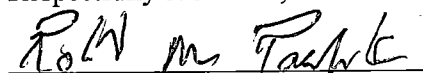
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kashif Poiteia Nash 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 2/19/2016. 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 Kashif Poiteia Nash.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Union County
Honorable Brooks P. Goldsmith, Circuit Court Judge

KASHIF POITEIA NASH

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Kashif Poiteia Nash, #358744 at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC, 29067-8069, this 11th day of July, 2016.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of July, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.