

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

RECEIVED

APR 20 2017

HARRY LAWRENCE ANTHONY,

S.C. SUPREME COURT
PETITIONER,

V.

THE STATE,

RESPONDENT

APPELLATE CASE NO 2016-001912

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where he failed to object to improper vouching by the solicitor during closing argument?

STATEMENT OF THE CASE

On April 12, 2007, the York County Grand Jury indicted Petitioner Harry Lawrence Anthony for four counts of distribution of cocaine base (crack). App. 442. Anthony was originally represented by Melvin Roberts, but his case was reassigned following Mr. Robert's untimely death. App. 1; App. 52.

On January 9-11, 2012, Anthony appeared for trial before the Honorable John C. Hayes, III, and a jury. App. 22. Anthony was represented by Bryson "B.J." Barrowclough and Harry Dest, and the state was represented by assistant solicitors Mindy Lipinski and Christopher Epting. App. 22. The jury found Anthony guilty as indicted, and Judge Hayes sentenced him to concurrent terms of fifteen years on all charges. App. 250 – 251; App. 255.

Anthony filed a timely notice of appeal. The direct appeal was perfected by the filing of the brief of appellant by appellate defender David Alexander. App. 257. Assistant attorney general Jennifer Ellis Roberts filed the brief of respondent. App. 283. The Court of Appeals affirmed Anthony's convictions and sentences in an unpublished opinion filed on November 5, 2014. App. 316. The remittitur was issued on November 21, 2014. App. 319.

On March 13, 2015, Anthony filed a timely application for post-conviction relief. App. 320. The state filed its Return on December 30, 2015. App. 350. On April 12, 2016, Anthony, through counsel, filed an amendment to his PCR application. App. 355.

On April 18, 2016, Anthony appeared before the Honorable Frank Addy for an evidentiary hearing. App. 358. Anthony was represented by Leah Moody, and the state was represented by assistant attorney general Justin J. Hunter. App. 358. Anthony and trial counsel Barrowclough both testified at the hearing. App. 359.

On August 19, 2016, Judge Addy filed an Order of Dismissal denying Anthony's request for post-conviction relief. App. 425.

This appeal follows.

ARGUMENT

The PCR court erred in finding that trial counsel rendered effective assistance of counsel where he failed to object to improper vouching by the solicitor during closing argument.

Relevant Facts

The case against Petitioner Harry Anthony began as an investigation into the disappearance of Margaret Matthews (“Matthews”). When Matthews was found deceased, the state recovered evidence and sent it to Quantico, Virginia for testing. When the analysis was complete, the state determined that it did not have sufficient evidence to charge Anthony with any crime related to Matthews’ death. R. 56, ll. 14-17; R. 106, l. 2-20; R. 253, ll. 12-21. Still intent on meting out some punishment against Anthony, the state charged him with four counts of possession with intent to distribute crack cocaine. There was no allegation that Anthony was a traditional drug dealer. Rather, the state’s case hinged on the testimony of Patricia Littlejohn (“Littlejohn”) and videotapes made of she and Anthony purportedly smoking crack cocaine and engaging in various consensual sex acts. App. 200, ll. 2-23; App. 216, l. 14 – 227, l. 11.

Littlejohn was an admitted crack addict, but claimed that the drugs in the video belonged to Anthony and were given to her in exchange for sex, though she denied being a prostitute. Littlejohn’s testimony suffered from severe credibility problems, as she had multiple convictions for crimes of dishonesty and lied about her pending charges for forgery. Further, the videos did nothing to corroborate the existence of any such “quid pro quo” agreement or show who brought the drugs to the home. App. 155, l. 7 – 168, l. 8. At the PCR hearing, trial counsel also admitted that Littlejohn believed that Anthony had some involvement in Matthews’ death and had pursued other false charges against Anthony in retribution. App. 400, l. – 400, l. 21.

Amongst other allegations raised in the PCR application and at the hearing,¹ Anthony asserted that trial counsel was ineffective in failing to object to improper vouching for and bolstering of Littlejohn by the solicitor. App. 333; App. 340; App. 357; App. 374, l. 17 – 376, l.

7. Specifically, in the solicitor's closing argument she said:

Imagine I came to you, and I said, "We're investigating a crime that happened at your neighbor's house." And if only we could look -- have gone back in time and looked through your window, I believe that we could catch the burglars breaking into your house. And were you there? "Yes, I was there. I might have seen it" or whatever. "Is there anything else that I could use to corroborate your testimony?" "Well, you know, my husband and I made a video that night and I'm going to show it." Would you have shown it to them? And what did she get for this? What did she have to gain? What was her motive in doing this? Did Lieutenant Hager say, "Thanks, here's your free trip to Disney world." She got a ticket to court, a subpoena. So that on top of having to share those videos with members of law enforcement, she got to know that they were played in an open courtroom where any number of strangers watched. And that wasn't enough. She had to come in and admit to you, that was her. That's her doing all that. I'm in some ways glad she said she wasn't a prostitute because what that tells me is, despite all of that, she has this much shred of human dignity left that she can still function. Because if those videos existed of me, and I knew they were discovered, I -- you wouldn't find me to serve a subpoena. I'd be living in an igloo in Alaska by myself for the rest of my lifelong life.

¹ In his original PCR application, Anthony's first allegation of ineffective assistance was that trial counsel failed "to make a contemporaneous motion for mistrial or object to the curative instruction to preserve our first issue for appeal." App. 327 – 328. PCR counsel failed to elicit any testimony to support that allegation, which related to the solicitor's improper elicitation of testimony that Anthony had "branded" Littlejohn. See App. 55, ll. 2-25; App. 78, ll. 23-25; App. 118, ll. 7-21; App. 146, l. 5 – 149, l. 16. Notably, the Court of Appeals written opinion reflects its finding that trial counsel's motion for mistrial was untimely such that he failed to preserve the issue for review on direct appeal. App. 317. Though PCR counsel asked trial counsel about "branding," she made no inquiry about the failure to object to the curative instruction, the timing of the motion for mistrial or the prejudice from the admissibility of that testimony. App. 400, l. 22 – 401, l. 6. Anthony did testify that trial counsel failed to make timely objections, but to the extent that was meant to elude to the untimeliness of the motion for mistrial, it was not ruled upon in the Order of Dismissal and PCR counsel failed to file a motion pursuant to Rule 59(e), SCRCF. App. 364, ll. 2-8.

PCR counsel further insinuated that Anthony could not pursue the violation of his right to speedy trial at the PCR hearing because his original trial attorney, Melvin Roberts, had been murdered and was "not who [Anthony] PCR'd." As a result, Anthony withdrew the allegation. App. 371, l. 20 – 372, l. 25.

So while you and I may at first blush say, “She should have just owned that.” She has already owned more than most of us can even possibly imagine. And that does not cause you to question her credibility. All it is, is evidence that she’s trying to hold on to some last shred of dignity.

App. 210, l. 16 – 211, l. 21 (emphasis added). Nonetheless, the PCR court found that Anthony failed to cite any specific instance of improper argument by the State to which trial counsel should have objected. The court further found that trial counsel addressed Littlejohn’s credibility through cross-examination. Thus, the PCR court ruled that Anthony failed to show deficiency or prejudice with respect to this allegation. App. 433.

Discussion

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ ” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). “Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the

result of the proceedings would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The United States Supreme Court specifically ruled that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Moreover, the Court ruled that: “The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Id. at 696 (emphasis added).

Although a prosecutor may argue the credibility of a witness based on the record and its reasonable inferences, a prosecutor may not vouch for the credibility of a prosecution witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (citations omitted). As explained by this Court, “[v]ouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction.” Id. Generally, “[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.” Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). Relatedly, “[t]he ‘Golden Rule’ argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.

App. 2004), *reversed in part on other grounds by* 359 S.C. 260, 597 S.E.2d 169 (2004). Golden Rule Arguments are generally improper and may constitute reversible error. Id.

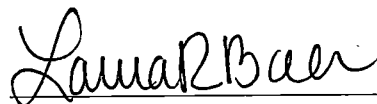
In the present case, the only evidence attributing ownership of the drugs to Anthony was the testimony of Littlejohn. The solicitor improperly asked the jurors to put themselves in Littlejohn's position and asserted what she would have done were she in Littlejohn's position. The implication of the argument was that the jury should believe Littlejohn for the mere fact that Littlejohn told police about the tapes and did not dodge her subpoena to appear in court. The solicitor further preyed on the emotion of the jury, asking them to consider the embarrassment that Littlejohn endured by having the videos shown in the courtroom. She asked the jury to excuse Littlejohn's failure to recognize that, if true, her accusations against Anthony would make her a prostitute, again based on the solicitor's personal assessment that Littlejohn was "trying to hold on to some last shred of dignity."

Despite the myriad of problems with the solicitor's argument, defense counsel never objected or moved to strike any portion of it. Anthony was prejudiced in that the solicitor's comments improperly vouched for and bolstered Littlejohn's testimony. See Vasquez v. State, 388 S.C. 447, 463, 698 S.E.2d 561, 569 ("[G]iven that trial counsel did not object, there was no opportunity for the trial judge to even attempt to cure the error."); see also Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013) (reiterating that "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness" and finding the failure to object to improper hearsay testimony was improper where the victim's credibility was "extremely crucial" to the outcome of the case prejudiced the defendant (emphasis in original)). The solicitor's improper vouching denied Anthony's due process right to a fair trial. See Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("The relevant question is

whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.""). Anthony is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner Harry Lawrence Anthony respectfully requests that this Court grant the petition for writ of certiorari and order further briefing on the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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HARRY LAWRENCE ANTHONY,

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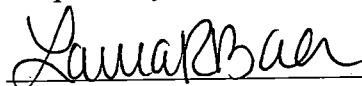
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Harry Lawrence Anthony states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Frank R. Addy, which was held on April 18, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Harry Lawrence Anthony.

Respectfully Submitted,



Laura R. Baer

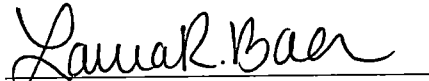
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Laura R. Baer
Appellate Defender

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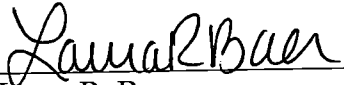
V.

THE STATE,

RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Harry Lawrence Anthony, 426 South Congress Street, York, SC 29745, this 20th day of April, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of April, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023