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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Brian M. Gibbons, Circuit Court Judge

MICKEY MARKELL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001292

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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South Carolina Commission on Indigent Defense
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ISSUES PRESENTED

- I. Whether there was any evidence to support the post-conviction relief judge's finding that petitioner was entitled to a belated review of his direct appeal issues?**
- II. Whether trial counsel was ineffective in failing to object to that portion of the solicitor's closing argument that vouched for the State's witnesses when credibility was the key issue in the case?**

STATEMENT

Petitioner was indicted on a multi-count superseding indictment for criminal gangs by the state grand jury. Trial proceeded on July 16-18, 2013, before the Honorable William H. Seals, Jr. in Sumter County. Petitioner was convicted of and sentenced as follows: five (5) years for criminal conspiracy, life imprisonment for accessory before the fact to murder, five (5) years for pointing and presenting a firearm, and one (1) year for unlawful carrying of a pistol. (App. p. 796-797) Shaun C. Kent, Esq. was defense counsel. Cary Goings, Esq. and Curtis Pauling, Esq. were the assistant solicitors. (App. p. 1). There was no direct appeal.

Petitioner filed an application for post- conviction relief on July 22, 2014, and a petition in support on or about August 15, 2014. (App. p. 637- p. 643). Respondent filed a return dated October 22, 2014. The return consented to a belated appeal. (App. p. 644- p. 651).

An evidentiary hearing was held on November 9, 2016, before the Honorable Brian M. Gibbons. Petitioner was present and was represented by Lance S. Boozer, Esq. Respondent was represented by LaRone K. Washington, Assistant Attorney General. Petitioner testified at the hearing and presented the testimony of Shaun Kent, Willie J. Johnson, and Trevaugh Jackson. (App. p. 652-789). On May 11, 2017, Judge Gibbons issued an order denying and dismissing the application the application for post- conviction relief but granting petitioner a belated appeal. (App. p. 796- p. 809).

Pursuant to Rule 243(i)(I), SCACR the issue of granting a belated appeal will be addressed. Another PCR issue related to ineffective assistance of trial counsel will also be presented. A separate brief will be submitted on direct appeal issues pursuant to White v. State.

ARGUMENTS

1. There was evidence to support the post-conviction relief judge's finding that petitioner was entitled to a belated review of his direct appeal issues.

This Court has repeatedly held that it must uphold the findings of the PCR judge if there is any evidence of probative value to support them. Roberts v. State, 361 S.C. 1, 602 S.E.2d 768 (2004); Caprood v. State, 335 S.C. 103, 525 S.E.2d 514 (2000); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624; Sosebee v. Lekee, 293 S.C. 531, 362 S.E.2d 22 (1987); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986); Knight v. State, 284 S.C. 138, 325 (1985); Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984); Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

Petitioner alleged in his application for post-conviction relief that his attorney failed to file an appeal on his behalf. (App. p. 638, p. 639, p. 641, p. 642).

Respondent in his return consented to a review of the direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent conceded that petitioner did not knowingly and voluntarily waive his right to a review of his direct appeal issues. (App. p. 649). At the evidentiary hearing petitioner explained that trial counsel filed a notice of intent to appeal but then he hired another attorney to do the appeal. That attorney also filed a notice of intent to appeal and the appellate court dismissed the appeal. (App. p. 663, line 18- p. 664, line 21). Trial counsel said he filed a notice of intent to appeal and then petitioner or his family hired another attorney in Florida to do the appeal. He forwarded copies of his file to that attorney but nothing even made it to the appellate defense. Trial counsel testified that the case had issues that needed to be raised on appeal. (App. p. 714, line 21- p. 715, line 19).

The PCR judge found that petitioner was entitled to a belated appeal. He noted that respondent consented to a review of direct appeal issues and conceded that petitioner did not

knowingly and voluntarily waive his right to a review of his direct appeal issues. (App. 797- p. 798).

The findings of the PCR judge should be upheld.

2. Trial counsel was ineffective in failing to object to that portion of the solicitor's closing argument that vouched for the State's witnesses when credibility was the key issue in the case.

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, trial counsel testified that two key witnesses that testified for the State were co-defendants Bryant Bradley and William Morgan. Trial counsel said, “Had the gang testimony not been allowed in, it was entirely a credibility case. But, yes, the credibility of the witnesses were incredibly important.” (App. p. 717, lines 17-23).

During closing argument the solicitor argued as follows.

You know, there was a lot of testimony about plea deals and proffer agreements, when statements were made, and that kind of thing. And, ladies and gentlemen, proffer agreements are done because the State has to know what an individual--what information he has before they can make any decisions about whether a plea agreement is going to be entered. That's the purpose of a proffer agreement. It is an agreement between the State and the defendant saying come in here, tell me what you know, and I will not use it against you. I cannot use it against you, but I have to know what you're going to say before I can make any type of determination as to what plea deal to give you.

Does that change the fact that it's not the truth?

No. **It's the truth.** (emphasis supplied)

(App. p. 578, line 17- p. 579, line 5).

Petitioner argued at the evidentiary hearing that trial counsel failed to object to the solicitor's improper vouching of his witnesses. (App. p. 677, line 24- p. 678, line 1; App. p. 679, lines 10-12). Trial counsel agreed with petitioner on this issue. (App. p. 732, line 23- p. 733, line 19). His explanation for not objecting was that he hated objecting during closing argument. (App. p. 733, lines 22-23).

In Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) a solicitor made the following argument to the jury:

Now, you may not have liked Bimbo Hudson. I didn't like Bimbo Hudson. I don't have to like him. All I have to do is determine whether or not he is a credible witness. I don't trust any of these people **until I corroborate their testimony.** And **once I corroborate their testimony,** yes, I put them on the witness stand because they were the ones that can tell it. (emphasis added by the court)

In reversing appellant's conviction 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 of 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 the 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 evidence in the record. *Id.*

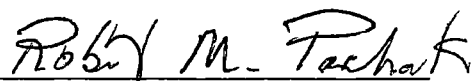
The Court also noted that "counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial."

In Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004), another defense attorney was held ineffective in failing to object to the solicitor's closing argument that vouched for the credibility of a police officer and stated that uncalled witnesses would have provided testimony cumulative to the officer's testimony. The Court held "the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (citation omitted).

Trial counsel in this case failed to assert a valid trial strategy and he admitted he erred in not objecting to the improper vouching. That is sufficient for a finding of ineffective assistance of counsel.

CONCLUSION

Trial counsel should be held ineffective and petitioner should be entitled to a belated appeal.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2018.

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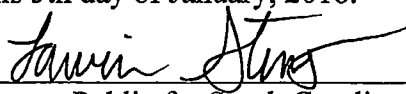
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and copies of the Petition for Writ of Certiorari, Appendix, and Supplemental Appendix have been served on Mickey Markell Johnson, #298814, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 5th day of January, 2018.



Robert M. Pachak
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 5th day of January, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.