

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 04 2018

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

SC. SUPREME COURT

J'COREY SUAVE HULL-KILGORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001682

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying post-conviction relief where trial counsel rendered ineffective assistance of counsel by failing to object to improper vouching in the solicitor's closing argument?

STATEMENT OF THE CASE

On August 20, 2009, the Spartanburg County Grand Jury returned an indictment for murder against Petitioner J'Corey Hull-Kilgore. App. 643.

On May 18-20, 2010, J'Corey proceeded to trial before the Honorable J. Derham Cole and a jury. J'Corey was represented by Clay Allen, and the State was represented by Derrick Balsa of the Seventh Circuit solicitor's office. App. 1. The jury convicted J'Corey of murder, and Judge Cole imposed a sentence of life without the possibility of parole.¹ App. 478 – 480; App. 485 – 486.

On direct appeal, J'Corey was represented by Chief Appellate Defender Robert Dudek. Assistant attorney general Brendan McDonald represented the State. App. 488; App. 501. The Court of Appeals affirmed the convictions in an unpublished opinion filed September 19, 2012. App. 523. The remittitur was sent on October 5, 2012. App. 525.

On May 6, 2013, J'Corey filed his application for post-conviction relief ("PCR"). App. 526. The PCR case was held in a temporary abeyance pending this Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). App. 535. In 2016, the State filed its return and partial motion to dismiss, followed by an amended return and motion for more definite statement. App. 538; App. 543. On November 1, 2016, J'Corey, through counsel, filed an addendum to his application. App. 549.

On November 8, 2016, an evidentiary hearing was held before the Honorable Frank R. Addy. J'Corey was represented by Susannah Ross, and the State was represented by assistant

¹ J'Corey was previously tried for armed robbery and the same murder offense. The jury acquitted J'Corey of the robbery but was hung as to the murder charge. App. 557, ll. 15-21.

attorney general Alicia Olive. App. 550. The two witnesses at the hearing included J'Corey and trial counsel, Clay Allen. App. 551.

On November 29, 2016, Judge Addy filed a form order denying J'Corey's PCR application and instructing the State to prepare a more formal order. App. 617. On June 15, 2017, a formal Order of Dismissal was filed. App. 621. PCR counsel filed a motion to alter or amend pursuant to Rule 59(e), SCRCF, on June 20, 2017. App. 635. The State filed a return on July 14, 2017. App. 637. On July 27, 2017, Judge Addy filed an order denying the motion to alter or amend. App. 642.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in denying post-conviction relief where trial counsel rendered ineffective assistance of counsel by failing to object to improper vouching in the solicitor's closing argument.

Relevant Facts

Petitioner J'Corey Hull-Kilgore was convicted of the murder for the shooting death Courtney Rogers (the decedent), a nineteen year old man who stopped by a local party house where a group of minor boys and young adult men were hanging out. There was no physical evidence connecting J'Corey to the crime. Rather, his conviction was based upon the testimony of purported eyewitnesses who were initially uncooperative with police. App. 159, l. 1 – 191, l. 2; App. 192, l. 23 – 208, l. 14; App. 212, l. 1 – 235, l. 20; App. 278, l. 5 – 299, l. 6; App. 318, l. 8 – 338, l. 5; App. 338, l. 14 – 370, l. 21; App. 381, l. 23 – 386, l. 2; App. 609, l. 16 – 611, l. 6. The defense theory of the case was that J'Corey's older brother, James Kilgore, shot the decedent and blamed J'Corey in an effort to protect himself. Once other witnesses heard rumors that J'Corey was the shooter, they joined in the story either out of ignorance or to cover up their own misdeeds. App. 440, l. 14 – 451, l. 10; App. 597, l. 12 – 598, l. 18. J'Corey and his younger brother, Javaris Hull-Smith, both testified that J'Corey was at home playing video games when the shooting occurred. App. 404, l. 15 – 410, l. 19; App. 418, l. 19 – 435, l. 5; App. 472, l. 18 – 473, l. 10; App. 595, l. 18 – 599, l. 14.

In his closing argument, the solicitor contended that the witnesses did not want to speak with police because it was “the way of the street” not to want to be involved. App. 451, l. 12 – 453, l. 3. He began the argument telling the jury “As I look back over this case to summarize to you, I see...” and subsequently preceded his version of each witness' testimony with “I see...” App. 451, l. 13 – 454, l. 24; App. 458, l. 22 – 459, l. 6. Then he said:

I deliberately left out what Keevin Anderson saw. **I truly believe he saw it**, but perhaps in a different fashion, because as you recall, and you've probably been surprised when I did this, but **I do it because my job is to find the truth and to seek justice.**

I'm deliberately reminding you of Penny Red saying he saw two guys in, the one, the shirt up. That was clearly J'Corey. He won't say who the other guy is.

But he named who else was in there. So the evidence suggests that it was Keevin. Keevin was clearly in the room. He clearly saw what happened. He too clearly is a criminal. But he told you what he saw but perhaps not everything.

App. 454, l. 25 – 455, l. 12 (emphasis added). Later, he said:

Ladies and gentlemen, **we brought in all of the people that we were certain were at the house.** We brought in and let them tell you what they know, explain why they lied to the police, explain why they didn't want to be involved.

App. 458, ll. 12-15 (emphasis added).

At the PCR hearing, trial counsel Allen reviewed that portion of the solicitor's argument and confirmed his failure to object. App. 589, l. 11 – 590, l. 1; App. 607, ll. 5-7. In the PCR court's Order of Dismissal, the judge ruled:

Although this Court finds the argument was likely objectionable improper vouching, the argument was not so improper or inflammatory as to prejudice Applicant. Therefore, Applicant has failed to satisfy his burden of proving that there is a reasonable probability the outcome of the proceeding would have been different had an objection been made. See State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted) (“the appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion [and the] appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion.”). Accordingly, relief is denied on this ground.

App. 632 – 633.

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). 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.

While this Court gives great deference to a PCR judge’s findings of fact, Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), “[a] PCR judge’s findings will not be upheld if such findings are not supported by probative evidence.” Horton v. State, 306 S.C. 252, 255, 411 S.E.2d 223, 225 (1991) (emphasis added); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992). Further, the Court will review questions of law *de novo*, and reverse the decision of the PCR court when it is controlled by an error of law.” Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

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).

The solicitor’s closing argument in the case was continuously framed as what he saw when he reflected on the testimony. In midst of that, he told the jurors that he was “deliberately” not going to rely upon what Keevin Anderson saw, though he truly believed that he was an eyewitness, because it was the solicitor’s “job... to find the truth and to seek justice.” App. 454, l. 25 – 455, l. 4. Then he said that he would “deliberately” remind them of what Penny Red, a.k.a. Taquil Nabors, said during his testimony. App. 455, ll. 5-7. Later, he explained to the jury that “we,” ostensibly the trust and justice seekers in the solicitor’s office, “we brought in all of the people that we were certain were at the house.” App. 458, ll. 12-15. When viewed as a whole, the closing argument placed the prestige of the government behind its witnesses, implying that the solicitor would not rely upon evidence if he were not personally convinced of its truth. Trial counsel should have objected to the solicitor’s improper argument. 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.”); 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)).

J’Corey was prejudiced by the solicitor’s improper vouching denied J’Corey’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.”). The PCR court inexplicably supported its contrary finding with the following quotation from State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003): “[T]he appropriateness of a solicitor’s closing argument is a matter left to the trial court’s sound discretion [and the] appellate court will not disturb a trial court’s ruling regarding closing argument unless there is an abuse of that discretion.” App. 632 – 633. Here, no objection was ever made by trial counsel to the solicitor’s closing such that the trial court never made a ruling on the objection. Thus, this quotation for Rudd is wholly inapplicable to this case. Rather, the PCR court should have focused upon the fact that the evidence against J’Corey was based solely upon the substantially varying accounts of witnesses, who had motives to lie. Thus, there is a reasonable probability that, absent the solicitor’s vouching, the result of the proceedings would have been different.

CONCLUSION

Based on the foregoing, Petitioner J'Corey Hull-Kilgore respectfully requests that this Court grant the petition for writ of certiorari and order further briefing of the issue raised herein. In the event that this Court dispenses with further briefing, Petitioner requests that this court reverse the order denying post-conviction relief and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of April, 2018.

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J'COREY SUAVE HULL-KILGORE,

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CERTIFICATE OF SERVICE
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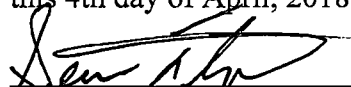
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon J'Corey Suave Hull-Kilgore, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 4th day of April, 2018.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of April, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022 .