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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

WALTER MONROE LANCE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001966

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 6

PETITION TO BE RELIEVED AS COUNSEL 7

ISSUE PRESENTED

Was trial counsel ineffective in failing to object to the State's improper closing argument referencing Petitioner's prior record and asking the jury to imagine the terror the witness experienced?

STATEMENT

In January of 2012, the Spartanburg County Grand Jury indicted Petitioner, Walter Monroe Lance, of criminal sexual conduct first degree, assault with intent to commit criminal sexual conduct first degree, strong arm robbery and kidnapping, indictments #2012-GS-42-0201, counts I, II and III and #2012-GS-42-0203. On May 7, 2012, Petitioner proceeded to jury trial before the Honorable J. Derham Cole on the charges of, assault with intent to commit criminal sexual conduct first degree, strong arm robbery and kidnapping. The State *nolle prossed* the criminal sexual conduct first degree charge. Robert Hall represented Petitioner at trial. Barry Barnette and Timi Poulos prosecuted the case. The jury returned verdicts of guilty and Judge Cole sentenced Petitioner to an aggregate sentence of fifty (50) years, imposing consecutive sentences of thirty (30) years for assault with intent to commit criminal sexual conduct first degree, fifteen (15) years for strong arm robbery and five (5) years for kidnapping. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal on January 22, 2014. State v. Lance, Op. No. 2014-UP-021 (S.C.Ct.App. filed January 22, 2014).

On November 10, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on April 7, 2015. On June 13, 2016, an evidentiary hearing wa held before the Honorable R. Ferrell Cothran, Jr. J. Brandt Rucker represented Petitioner at the PCR hearing. Alicia A. Olive represented the State. In a written order signed August 23, 2017, Judge Cothran denied relief and dismissed the application. A timely notice of intent to appeal was served on September 23, 2017. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective in failing to object to the State's improper closing argument referencing Petitioner's prior record and asking the jury to imagine the terror the witness experienced.

During closing argument the prosecutor told the jury, "You heard his record. You can use that to weigh his credibility too. He's back 17 days and did this. Nobody deserved what happened to her that day. Can you imagine the terror? You'd give up anything for the person to leave you alone – your keys, your car, anything." (App. p. 266, lines 18-22). Trial counsel did not object.

During the PCR hearing, trial counsel was questioned about why he did not object to the closing argument. (App. p. 389, line 14 – p. 390, 391, lines 1-20). As to the reference to the prior record, trial counsel testified that he did not object because he did not want to bring attention to the reference. (App. p. 390, lines 1-25). PCR counsel asked, "And you agree that that is undoubtedly prior bad act or character evidence, not credibility evidence?" (App. p. 391, lines 7-8). Trial counsel answered, "I can see your argument. I don't know if I did at that time or not." (App. p. 391, lines 9-10). Trial counsel agreed that by failing to object, the issue was not preserved for appellate review. (App. p. 391, lines 2-6).

As to the, "Can you imagine the terror?" comment, trial counsel agreed that, "It's trying to put the jury into the position of the victim." (App. p. 391, lines 11-15). Trial counsel agreed that he did not object and that by failing to object, the issue was not preserved for appellate review. (App. p. 391, lines 16-20). Trial counsel was ineffective in failing to object to the improper closing argument.

In State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 880 (2007), the South Carolina Supreme Court wrote:

“A solicitor’s closing argument must be carefully tailored not to appeal to the personal biases of the jury.” State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (citing Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), cert. denied, 544 U.S. 943, 125 S.Ct. 1645, 161 L.Ed.2d 511 (2005)). “The 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.” Id.

“Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. A Golden Rule argument asking the jurors to place themselves in the victim’s shoes tends to completely destroy all sense of partiality of the jurors, and its effect is to arouse passion and prejudice.” Reese at 38 (internal citations omitted).

“Prosecutors are bound to rules of fairness in their closing arguments.” State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (2008) (citing State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). “While a solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor’s closing argument must, of course, be based upon this principle.” Id. at 334

In State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (1995), the South Carolina Court of Appeals reversed where the prosecutor asked the jury to place themselves in the place of the victim. The reference to the prior record was improperly designed to arouse the jurors’ passions or prejudices. The prosecutor then asked the jury to imagine the terror, improperly asking the jurors to place themselves in the shoes of the witness. Trial counsel was ineffective in failing to object to the improper closing argument.


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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164

(2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that if counsel had objected to the improper closing argument, the result of the proceeding would have been different, either at trial or on direct appeal. Petitioner is entitled to a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

WALTER MONROE LANCE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,


RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Walter Monroe Lance 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 R. Ferrell Cothran, which was held on June 13, 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 Walter Monroe Lance.

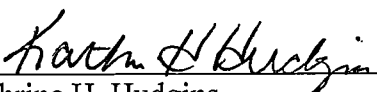
Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of April, 2018.

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."


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This 6th day of April, 2018.

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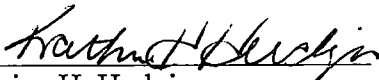
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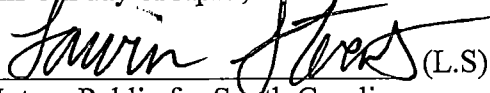
CERTIFICATE OF SERVICE

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 Megan Harrigan Jameson, 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 Walter Monroe Lance, #154185, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 6th day of April, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2018.



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

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