

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Frank R. Addy, Circuit Court Judge

Appellate Case No. 2017-001682

RECEIVED

JUL 12 2018

S.C. SUPREME COURT

J'COREY SUAVE HULL-KILGORE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JORDAN A. COX
S.C. Bar No. 103157
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3305

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUE.....ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....6

ARGUMENT.....7

Because the State’s closing argument did not contain improper vouching of witnesses, Petitioner failed to meets his burden of proof and the PCR court properly denied relief.

CONCLUSION.....13

STATEMENT OF ISSUE

Did the post-conviction relief court properly deny relief when Petitioner failed to show improper vouching within the State's closing argument?

STATEMENT OF THE CASE

On May 24, 2008, at 8:24 PM, authorities were dispatched to the intersection of South Liberty and Amos Street in Spartanburg following reports of a shooting. (App. p. 40). Upon arriving at the scene, first responder Deputy Bradford James explained he observed Courtney Rogers (“Victim”) with several individuals around him attempting to render aid. (App. p. 66). Approaching Victim, James noticed a gunshot wound to the base of his neck near the collarbone. (App. p. 65). As James was attempting to apply pressure to the wound in an effort to stop the bleeding, Victim grabbed James and stated “I’m going to die.” (App. p. 65). Victim’s statement proved to be prophetic as the wounds were indeed fatal. (App. p. 56).

While James and others were attempting to aid Victim, Officer Derrick Canada, understanding the shooting had happened nearby, responded to a residence located on East Columbia Avenue. (App. p. 79). Arriving at the residence, Canada encountered its occupant, Sandra Dandy and her then-boyfriend, Dwight Mills. (App. p. 80). After observing what appeared to be blood on the front porch, Canada turned the scene over to investigators who in turn sought a search warrant to process the scene. (App. p. 82).

SLED would later confirm the swabs taken from the blood on the front porch matched Victim’s blood. (App. p. 257). Additionally, authorities observed a bullet hole in the wall nearest the front porch and recovered a shell casing from a .380 handgun, with the head stamp, “RP.” (App. p. 120). Six days later, acting on a tip from Petitioner’s brother James and Demetrius Reid, authorities also recovered a loaded handgun containing five .380 rounds at the intersection of Williams Street and Harmony Drive in Spartanburg near Petitioner’s grandmother’s house. (App.

p. 120). SLED later determined the shell casing found at the scene was fired by the .380 handgun. (App. p. 263).

During its August 2009 term, the Spartanburg County Grand Jury indicted Petitioner J'Corey Sauve Hull-Kilgore ("Petitioner") for the murder of Courtney Rogers ("Victim"). On May 18, 2010, Petitioner proceeded to a jury trial in the Spartanburg County Court of General Sessions before the Honorable J. Derham Cole, Circuit Court Judge. On May 20, 2010, the jury convicted Petitioner of murder. Judge Cole sentenced Petitioner to confinement for a period of life without parole for the murder conviction.¹

At trial, the State called several witnesses who were in and around Dandy's residence at the time Victim was shot. First, the State called Dandy who testified she observed Petitioner and Victim briefly talking to one another near the doorway to the front porch of her residence when she heard a "loud sound." (App. p. 154). This testimony was essentially echoed by witness Keevin Anderson who added that in addition to hearing the shot, he witnessed Petitioner shoot Victim and take his money. (App. p. 321).

The State also called Taquil "Penny Red" Nabors, who was an eyewitness to the shooting. (App. p. 209). Specifically, Nabors, who was friends with both Petitioner and Victim, explained he was on the front porch playing cards when Victim pulled up in front of Dandy's residence prompting him to approach Victim. (App. p. 212). Continuing, Nabors testified he spoke with Victim briefly before Victim walked up the porch and entered the residence. (App. p. 212). Nabors explained he did not see Victim again until he heard a "gun cock back" causing him to look into the residence. (App. p. 213). Upon doing so, Nabors witnessed Petitioner shoot

¹ Petitioner was previously tried for armed robbery and the same murder offense. The jury acquitted Petitioner of the armed robbery charge, but was hung in regards to the murder charge.

Victim in the neck while Victim was walking out of the front door. (App. p. 214). Nabors added Victim was digging in his pocket when Petitioner shot him. (App. p. 214).

D'Angelo Miller also testified. In his testimony, Miller, who was dating Dandy's daughter and was friends with both Petitioner and Victim, explained that when Victim pulled into the driveway, Petitioner went around the side of the house with his brother James and asked James for his gun so he could rob Victim. (App. p. 278). Miller then observed Victim walk into the house. (App. p. 282). Understanding Petitioner was armed and intended to rob Victim, Miller walked into Dandy's house to get Dandy's young son and his girlfriend's young daughter out of harm's way. (App. p. 283). After getting the children, Miller locked himself and the children in a nearby bedroom when he heard a gunshot. (App. p. 284).

Petitioner's brother, James Kilgore, like Dandy, Anderson, Nabors and Miller, testified against Petitioner. (App. p. 338). In particular, Kilgore repeated Miller's testimony, that Petitioner approached him and asked for his handgun, adding that the handgun he gave Petitioner was the handgun recovered near Petitioner's grandmother's house. (App. p. 343).

After the close of the State's case, Petitioner elected to present a defense. Specifically, Petitioner's younger brother, Javaris Hull-Smith told the jury he was playing video games with Petitioner until sometime after dark when the two began talking to some girls. (App. p. 408). Continuing, Hull-Smith explained Petitioner only briefly left the house after hearing sirens in the neighborhood. (App. p. 408). Consistent with his younger brother's testimony, Petitioner testified he was playing video games, then talked to some girls who happened to be in the neighborhood before leaving the house around 9:00 PM or 10:00 PM. (App. p. 421). Petitioner noted he left the house to check on his older brother James because he knew James was at

Dandy's house and believed the sirens were coming from that direction. (App. p. 422). Finally, Petitioner denied ever seeing Victim that day and stated he never asked his brother for a gun and never shot Victim. (App. p. 426).

Petitioner filed a timely notice of appeal and it was perfected on his behalf by Chief Appellate Defender Robert Dudek of the South Carolina Commission of Indigent Defense—Office of Appellate Defense. Assistant Attorney General Brendan McDonald, Esquire, represented the State. The South Carolina Court of Appeals affirmed the conviction in an unpublished opinion filed September 19, 2012. State v. Kilgore, Op. Np. 1212-UP-531(S.C. Ct. App. filed September 19, 2012). The remittitur was sent on October 5, 2012.

Thereafter, on May 6, 2013, Petitioner filed an application for post-conviction relief, alleging he was being held in custody unlawfully based on claims that Petitioner's sentence was in violation of his Eighth Amendment rights, in addition to various allegations of ineffective assistance of counsel. The PCR case was held in temporary abeyance pending this Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).² The State filed its Return and Partial Motion to Dismiss on February 11, 2016, requesting that the claims related to Aiken v. Byars be dismissed and an evidentiary hearing be held solely as to the allegations of ineffective assistance of counsel. On August 29, 2016, Respondent made an Amended Return and Motion for More Definite Statement. Petitioner then filed an Application Addendum on November 1, 2016.

An evidentiary hearing into the matter was held on November 8, 2016, in Spartanburg County Court of Common Pleas before the Honorable Frank R. Addy, Circuit Court Judge.

² The Aiken v. Byars case was concluded on June 1, 2015 when the United States Supreme Court denied the petition for writ of certiorari.

Petitioner was present at the hearing and represented by Susannah Ross, Esquire. Assistant Attorney General Alicia Olive of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner proceeded forward on allegations that trial counsel was ineffective for failing to object to improper vouching by the State, failing to object to an improper closing argument by the State, and failing to ensure Petitioner was competent to decide whether to testify. Petitioner testified on his own behalf. Clay T. Allen, Esquire ("Trial Counsel"), testified on behalf of Respondent.

On November 29, 2016, Judge Addy filed a form order denying Petitioner's PCR application and instructing the state to prepare a more formal order. Judge Addy signed a formal order denying the application, which was filed with the Spartanburg County Clerk of Court on June 15, 2017. Petitioner's counsel filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, on June 20, 2017. The State filed a Return on July 14, 2017. On July 27, 2017, Judge Addy filed an order denying the Motion to Alter or Amend. Petitioner filed a Notice of Appeal on August 8, 2017. Petitioner submitted his Petition for a Writ of Certiorari and Appendix on April 4, 2018.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Because the State's closing argument did not contain improper vouching of witnesses, Petitioner failed to meet his burden of proof and the PCR court properly denied relief.

Petitioner asserts that he is entitled to post-conviction relief for his trial counsel's failure to object to the State's closing argument and this constituted ineffective assistance of counsel. However, because the State's closing argument did not contain improper vouching, Petitioner failed to prove he was prejudiced by any deficient performance of his trial counsel. Therefore, the PCR court properly denied relief.

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 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at

625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner has failed to prove Trial Counsel rendered ineffective assistance for failing to object to the State’s closing argument. Petitioner asserts that Trial Counsel should have objected, arguing “[w]hen 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.” (Petition for Writ of Cert., p. 7).

A solicitor has a **right to state his version of the testimony** and to comment on the weight to be given such testimony. (emphasis added) State v. Cooper, 334 S.C. 540, 514 S.E.2d 284 (1999). 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. During closing arguments, 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)(citing State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001)).

Petitioner asserts that the State made improper arguments during its closing argument, but fails to place the alleged improper arguments into context. At the beginning of its closing, the State argued:

MR. BULSA: Let me be a little formal.

Ladies and gentleman, I thank you for our attention. It's been a long trial. It's an important trial. **As I look back over this case to summarize to you**, I see a tragic situation, senseless death of a 19-year old boy.

I see a house where young people gather. They all know each other. Brandon drops by. A senseless shooting occurs. I see everyone flee the area. I see a friend follow his friend and almost essentially watch him die.

(App. p. 451).

Further into closing argument, the State argued:

MR. BULSA: 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 shirt up. That was clearly, [Petitioner]. 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. p. 455)(emphasis added).

Finally, near the end of closing argument, the State argued:

MR. BULSA: Ladies and gentleman, we brought in all of the people 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. p. 456).

Petitioner has failed to identify any examples of explicit personal assurances by the State during closing argument. In his own argument for reversal, Petitioner claims that the State's closing argument **implies** that the solicitor would not rely upon evidence if he were not personally convinced of its truth. This leap by Petitioner, without further evidence of assurances of truthfulness, falls well below the burden of proof required under Vaughn.

Petitioner relies on Matthews, arguing the State's closing argument was improper vouching of its own witnesses. Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). In Matthews, this Court held trial counsel was ineffective for failing to object to improper vouching, when the State argued:

Now, you may not have to like [witness]. I didn't like [witness]. 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 were there, they were that can tell it. (original emphasis).

Matthews, 350 S.C. at 275. This statement was found to be improper, because "[it] led the jury to believe the government corroborated the witness' testimony before trial and found it credible." Id. at 266.

Petitioner has presented no evidence of the State relying on information not presented to the jury supportive of the trial testimony. The State did not claim to have found the witnesses to be credible, and no statement during closing argument could have led the jury to believe the State had corroborated the witness' testimony before trial. The State deliberately recalled the attention of the jury back to the jury testimony of Penny Red, in order to point out discrepancies

in the trial testimony of Keevin Anderson. Therefore, this was not improper vouching and the PCR court properly denied relief.

Although the State's comments during closing were proper, Petitioner failed to meet his burden of proving he was prejudiced. The PCR court ruled the State's closing argument was not so improper or inflammatory as to prejudice Petitioner.³ (App. p. 632). Petitioner asserts that the PCR court should have focused upon the fact that the evidence against J'Cory was based solely upon the substantially varying accounts of witnesses, who had motives to lie.

Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). 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. Id (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

In this case, Petitioner has failed to present evidence of what the specific impact of any improper comment made during the State's closing argument. The State's comments were all confined to facts established during trial and, in the context of the entire record, were not so egregious as to have infected the trial with unfairness as to make the conviction a denial of due process. Further, the trial judge effectively cured any possible vouching of credibility by the State during its jury instructions. The trial judge instructed the jury as follows:

THE COURT: It is your exclusive duty to determine what the facts are. You do that through your own common sense examination and evaluation of all of the testimony and other evidence received during the trial of this case.

³ In its Order of Dismissal, the PCR wrongly relied on an "abuse of discretion" standard when it evaluated the prejudice prong of Petitioner allegation. Respondent recognizes this to be an error and does not wish to incorporate the argument in its Return to the Petition for Writ of Certiorari.

You 12 jurors alone will decide what weight, value and effect to give any particular testimony or other evidence in the case.

...

[Y]ou are the sole judges of the facts in this case, and you are also therefore necessarily the sole judges of the credibility, that is the believability, of each witness that has testified during the course of trial.

You 12 jurors alone will decide what weight, value and effect to give any particular witness' testimony or even portions of a witness' testimony.

...

You should also consider any bias or prejudice or interest that the witness might have with respect to the case. In other words, do you find some reason that a particular witness would come into court and would testify one way or another to help or to hurt one side or the other.

And you may consider any interest that a witness might have in the outcome of the case if you determine that a witness does have such an interest and you find that that interest would bear upon that particular witness' credibility.

(App. p. 459-477).

Petitioner has not challenged the validity of the trial judge's jury instruction. It is clear from the instructions, the jury was made aware of the proper weight to give witness testimony and what constitutes evidence in the case. Any potential error by the State was cured by the trial judge's jury instruction. Specifically, Petitioner asserts he was unfairly prejudiced at trial, since evidence of against him was based solely upon varying witness accounts, who had motives to lie. The jury had the opportunity to weigh, and was further instructed by the trial judge to weigh, motives of witnesses when reaching their verdict. The jury weighed the evidence against Petitioner and found him guilty of murder. Therefore, Petitioner failed to meet his burden of proof and the PCR court properly denied relief.


CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

JORDAN A. COX
S.C. Bar No. 103157
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

July 12, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 12 2018

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2017-001682

J'Corey Suave Hull-Kilgore, Petitioner,

v.

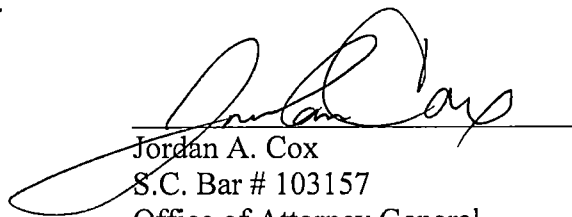
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

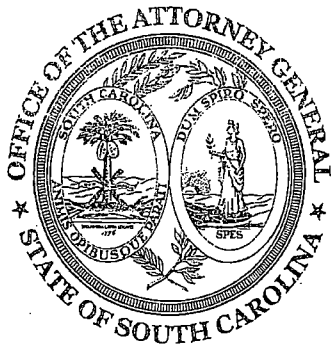
I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Laura R. Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589**

This 12th day of July, 2018.



Jordan A. Cox
S.C. Bar # 103157
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT



RECEIVED

JUL 12 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 12, 2018

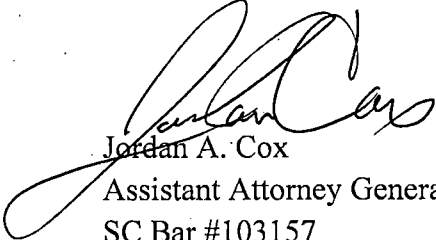
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: J'Corey Suave Hull-Kilgore, #340853 v. State of South Carolina
Appellate Case No.: 2017-001682
Lower Court Case: 2013-CP-42-2062

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,


Jordan A. Cox
Assistant Attorney General
SC Bar #103157

JAC/lm
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Director - Victim Advocacy Division