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AUG 09 2018

S.C. SUPREME COURT



ALAN WILSON
ATTORNEY GENERAL

August 9, 2018

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

Re: Gartharee J. Hinson v. State of South Carolina
2016-CP-13-0735

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
SC Bar #101260

JEJ/mm
Enclosures

cc: Lance S. Boozer, Esquire
South Carolina Department of Corrections
The Honorable Wanda C. Miles, Clerk of Court of Chesterfield County
The Honorable William B. Rogers, Jr., Fourth Circuit Solicitor
Office of Appellate Defense
Trisha Allen, Director - Victim Advocacy Division

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2016-CP-13-00735

Gartharee J. Hinson,.....Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Roger E. Henderson’s order dated April 17, 2018, and filed May 7, 2018, granting post-conviction relief to the Respondent. The State filed a motion to reconsider, which was denied on July 23, 2018, and received by the State on August 8, 2018. A copy of the order on appeal is attached to this notice.

[signature page to follow]

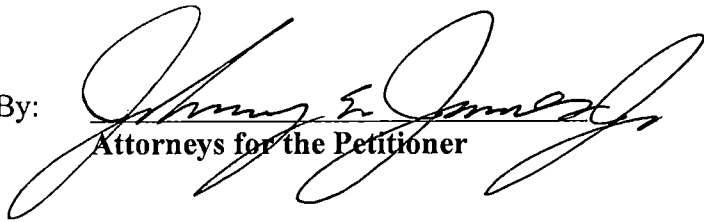
Respectfully submitted,

ALAN WILSON
Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General
S.C. Bar #101260

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

By:


Attorneys for the Petitioner

Columbia, South Carolina

August 9, 2018

Other counsel of record:

Lance S. Boozer, Esquire
1419 Pendleton Street
Columbia, SC 29201

STATE OF SOUTH CAROLINA
In The Supreme Court

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AUG 09 2018

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger E. Henderson, Circuit Court Judge

Case No. 2016-CP-13-00735

Gartharee Hinson, Respondent,

v.

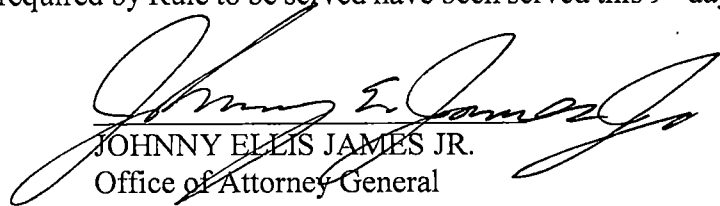
State of South Carolina, Petitioner.

PROOF OF SERVICE

I, Johnny Ellis James Jr., Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Lance S. Boozer, Esquire
1419 Pendleton Street
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served this 9th day of August, 2018.



JOHNNY ELLIS JAMES JR.
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHESTERFIELD)
)
 Gartharee Hinson, #272766,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOURTH JUDICIAL CIRCUIT
 C/A NO: 2016-CP-13-735

ORDER GRANTING APPLICATION
 FOR POST-CONVICTION RELIEF

2016 MAY -7 AM 8:31
 Wanda Miles
 CLERK OF COURT
 CHESTERFIELD COUNTY, S.C.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is currently confined in the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's orders of commitment. Applicant was indicted by the Chesterfield County Grand Jury for armed robbery (2013-GS-13-89), kidnapping (2013-GS-13-90) and assault and battery of a high and aggravated nature (2013-GS-13-91). Applicant was tried by jury before the Honorable Steven H. John on September 16, 2014. Applicant was represented by M.W. "Trey" Cockrell, Esquire ("counsel"). The jury found Applicant guilty as indicted for armed robbery and kidnapping and the lesser included offense of assault and battery in the first degree. Judge John sentenced the Applicant to 21 years imprisonment for armed robbery and kidnapping, concurrently, and 10 years concurrent for assault and battery, first degree. Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Hinson, Opinion No. 2016-UP-164 (S. Ct. App. April 6, 2016). The Remittitur was issued on May 3, 2016.

Applicant initially filed an Application for post-conviction relief on October 3, 2016. Applicant raised the following allegations:

1. "Denial of Counsel at Critical State of Proceedings"
 - a. "Immediately after his arrest Applicant requested a preliminary hearing. A preliminary hearing was held in this case without the assistance of counsel. The reasons for this is a conflict of interest with the Public Defender. There is no waiver of right to counsel."
2. "Prosecutorial Misconduct"
 - a. "During Applicant's trial, an agent of the Chesterfield County Sheriff's Office, among other things, viewed a video and then interviewed the victim relaying to the victim what was in the video at the time in question. This aspect is highly suggestive with reference to the identification of the Applicant."
3. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to investigate adequately the facts and circumstances surrounding the Applicant's case. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of Applicant's guilt or innocence."

Applicant subsequently filed an amendment on October 26, 2017, alleging:

- (a) Counsel failed to move to suppress evidence or contemporaneously object.
- (b) Counsel failed to act when a current sheriff deputy's wife was seated on the jury. The issue was then brought to the attention of the Court by the State. Tr. p. 31. The Court own its own removed a potential juror when it was revealed his half-brother worked for the Chesterfield County Sheriff's office. Tr. p. 10.
- (c) Counsel failed to object or otherwise act when alleged victim identified Defendant as perpetrator based on recognizing his voice. Tr. p. 65.
- (d) Counsel failed to object to the State's improper vouching for witnesses during closing remarks.
- (e) Counsel was ineffective for failing to request a hearing pursuant to Jackson v. Denno.
- (f) Applicant believes counsel failed to adequately cross-examine Ms. Briggs.

The State made its Return on December 4, 2017. An evidentiary hearing was convened on January 16, 2018, at the Dillon County Courthouse before the Honorable Roger E. Henderson. The Applicant was present and represented by Lance S. Boozer, Esq. The State was



present and represented by Johnny E. James, Jr., Esq. This Court makes the following findings of fact and conclusions of law.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 268 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is reasonable probably 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. Based on the record and testimony presented at

the PCR hearing, this Court finds that the Applicant has met his burden of proof as it relates to Applicant's allegation counsel failed to object to the State's improper vouching for a witness during closing arguments. This Court denies Applicant's other allegations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Counsel failed to object to the State's improper vouching for witness during closing remarks.

Applicant alleged and testified counsel was ineffective for failing to object to the State's improper vouching for witnesses during closing remarks.

During the trial, Applicant's co-defendant Richard Martin testified on behalf of the prosecution. During the State's direct examination, Martin admitted that he faced the same charges as Applicant and testified he was an active participant in the armed robbery. The State asked the following on direct examination:

Q: Do you have pending charges?

A: Yes, I do.

Q: And let's get this out in front here first. Have you been promised anything in exchange for your testimony?

A: No, sir.

Q: And why did you agree to testify here in (sic) behalf of the State?

A: Because of the situation and I felt that something should be done.

Trial tr. p. 150, ll. 13-22.

The State went on to ask Martin the following:

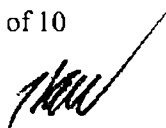
Q: And, again, and this is the last time I'll ask you. Have I or has the State promised you anything in exchange for your testimony?

A: No.

Q: And you basically are testifying today not knowing what will happen on your case?

A: Yes, sir.

Trial tr. p. 163, ll. 7-13.



During closing remarks to the jury, the State asserted:

Then you heard from Mr. Martin, and Mr. Martin told you he had no idea of what was going to be the outcome of his case. *He is telling you the absolute truth.*

Trial tr. p. 207, ll. 12-14.

The State went on:

I don't want a witness to get up here and lie or whatever. I want a witness to tell the truth, and if something has to be explained, so be it.

Trial tr. p. 208, ll. 15-17.

At the PCR hearing, counsel testified that during his cross-examination of Martin, his strategy was to attack his credibility and put before the jury that Martin was potentially receiving a deal in exchange for his testimony. Upon questioning by Applicant, counsel admitted that the statements cited above in the State's closing remarks constituted impermissible vouching. Counsel acknowledged he did not object.

A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (1999). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). In Kelly, the Supreme Court found an assistant solicitor improperly bolstered a witness' credibility through improper questioning. While the assistant solicitor in Kelly did not assert he had personal knowledge his witness was testifying truthfully, he improperly phrased his questions in the first person. Kelly, 343 S.C. at 369. The solicitor asked a witness, "*What did I tell you that I*



absolutely required regarding your testimony to this jury today?" and *"Did I tell you to tell the truth to this jury."* *Id.* at 368, 540 S.E.2d at 860, State v. Shuler, 545 S.E.2d. 805, 344 S.C. 604 (S.C. 2001.) The Court found the jury could have perceived the assistant solicitor held the opinion the witness was, in fact telling the truth. *Id.* at 369, 540 S.E.2d at 861. The witness's testimony, there, carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment at the witness. *Id.*

Similarly, this Court finds the State's comments in closing argument relating to Martin constituted improper vouching. This Court further finds counsel should have objected and counsel failed to articulate a valid strategic reason for failing to do so. This Court finds counsel's failure to object prejudiced Applicant and that his failure to object fell below an objective standard of reasonableness. This failure to object led to a reasonable probability that the outcome of the trial would have been different had he objected. Accordingly, this Court must grant Applicant's Application as it relates to this allegation and a order a new trial.

2. "Denial of Counsel at Critical State of Proceedings"

Applicant alleged and testified he was forced to proceed to a preliminary hearing without counsel even after having requested counsel. This Court finds based on the record and testimony presented at the hearing, no constitution violations occurred with respect to Applicant's preliminary hearing.

3. "Prosecutorial Misconduct"

Applicant alleged and testified that during his trial, an agent of the Chesterfield County Sheriff's office viewed a video and then interviewed the victim relaying to the victim what he saw in the video creating an invalid and suggestive positive identification of the Applicant.

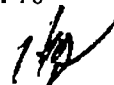
This Court finds Applicant's claims with regard to the State's viewing of any video in conjunction with interviewing any witnesses or other visual evidence relating to Applicant's identity are without merit either in the form of prosecutorial misconduct or ineffective assistance of counsel. Applicant failed to prove the prosecution committed any sort of prosecutorial misconduct in this regard or that counsel should have objected to any use of the video. Accordingly, these allegations are dismissed.

4. "Ineffective Assistance of Counsel"

Applicant alleged and testified counsel was ineffective for failing to investigate and move to suppress evidence. At the PCR hearing, Applicant failed to present any evidence that counsel's investigation into the facts and circumstances of the case was deficient. Counsel testified that he met with Applicant multiple times prior to trial, that he received and reviewed Rule 5 materials and was prepared for trial. This Court also finds Applicant failed to prove counsel was deficient in failing to suppress evidence such as videos or photographs at trial. This Court finds counsel was not ineffective in investigating the case or moving to suppress evidence and must deny these allegations.

5. Counsel failed to act when a current sheriff deputy's wife was seated on the jury.

Applicant alleged and testified counsel was ineffective for failing to act when a current sheriff deputy's wife was seated on the jury. Counsel testified and acknowledged that the trial court removed a potential juror who indicated he had a half-brother who worked for the Chesterfield County Sheriff's office. Counsel further testified that Juror Number 91 was the wife of a Chesterfield County Deputy and that both he and the Applicant were aware of this



relationship. However, counsel testified Applicant actually wanted to seat this juror and he did so because Applicant told him he thought she "looked focused." This Court finds that because both Applicant and counsel were aware of the juror's relationship and that the Applicant actually wanted her seated on the jury, counsel was not ineffective in this regard. Accordingly, this allegation must be denied.

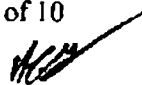
6. Counsel failed to object or otherwise act when alleged victim identified Applicant as perpetrator based on recognizing his voice.

Applicant alleged and testified counsel was ineffective for failing to object or otherwise act when the alleged victim identified Applicant as a perpetrator based on recognizing his voice. Specifically, at trial, victim testified that he recognized the Applicant's voice because when he was a kid, his grandmother lived down the road from Applicant's grandparents and they had been friends and attended school together at that time. No objection was made. Counsel testified at the PCR hearing he did not object because he believed the jury thought this was incredible and believed it benefited Applicant to hear this testimony. Accordingly, this Court finds counsel was not ineffective for failing to object to the witness testifying that he recognized the Applicant's voice. This Court finds counsel articulated a valid strategic reason for not objecting. This allegation must be denied.

7. Counsel was ineffective for failing to request a hearing pursuant to Jackson v. Denno.

8. Applicant believes counsel failed to adequately cross-examine Ms. Briggs.

Applicant alleged and testified counsel was ineffective for failing to request a hearing pursuant to Jackson v. Denno to challenge any statements Applicant may have made and failed to



effectively cross-examine witness Ashlyn Briggs. Based on a review of the record, the testimony of counsel and Applicant, this Court finds counsel was not ineffective in failing to request a hearing pursuant to Jackson v. Denno or failing to adequately cross-examine Ms. Briggs. Accordingly, these allegations must be denied.

CONCLUSION

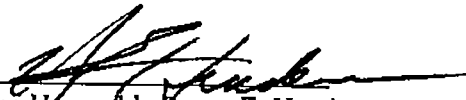
Based on all the foregoing, this Court finds and concludes Applicant has met his burden of proof in showing he received ineffective assistance of counsel for failing to object to improper vouching and counsel's performance prejudiced him. This Court finds, but for counsel's ineffectiveness, the outcome of the trial would have been different. Accordingly, this application for post-conviction relief must be granted as it relates to this allegation. Applicant's remaining allegations are denied.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be granted as it relates to counsel's failure to object to improper vouching;
2. The Applicant's convictions and sentences are vacated;
3. Applicant is entitled to a new trial;
4. Applicant is remanded to the custody of Chesterfield County;
5. Applicant's remaining allegations are denied.



AND IT IS SO ORDERED this 17th day of April, 2018.


The Honorable Roger E. Henderson
Presiding Judge
Fourth Judicial Circuit

Chesterfield, South Carolina

2018 MAY -7 AM 8:31
Manda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.