

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO LAURENS COUNTY
G. Thomas Cooper, Jr., PCR Judge
Eugene C. Griffith, Jr., Trial Judge

S.C. SUPREME COURT

Appellate Case No. 2017-002004

RICKY DALE PACE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE

Did the post-conviction relief court properly deny relief when Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the State's closing argument because the closing argument was proper and did not warrant an objection?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment from the Laurens County Clerk of Court. During the August 2011 term, the Laurens County Grand Jury indicted Petitioner, Ricky Dale Pace, on five counts of lewd acts on a child (2011-GS-30-1284 through – 1288). Petitioner was represented by Assistant Public Defenders Claude Howe, III and Chelsea McNeil of the Eighth Circuit Public Defender's Office. The case was prosecuted by Assistant Solicitor Lance Sheek of the Eighth Circuit Public Defender's Office.

On May 13, 2014, Petitioner proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. On May 15, 2014, the jury convicted Petitioner two counts of lewd acts on a child (2011-GS-30-1287 and 2011-GS-30-1288). The jury acquitted Petitioner on three counts of lewd acts on a child. The trial court sentenced Petitioner to ten years imprisonment on each count, with both sentences to be served concurrently.

Petitioner filed a notice of appeal and an appeal was perfected by Appellate Defender Laura Caudy with the South Carolina Commission on Indigent Defense. On appeal, Petitioner asserted the trial court erred by admitting the videotaped forensic interview of the minor complainant under S.C. Code Ann. § 17-23-175. Petitioner argued the statute is unconstitutional and violates the Confrontation Clause of the Sixth Amendment. Following briefing, oral arguments were held and thereafter a memorandum opinion was filed affirming Applicant's convictions. State v. Pace, Op. No. 2016-MO-010 (S.C. Sup. Ct. Filed April 13, 2016). The Remittitur was sent April 29, 2016.

Thereafter, on July 7, 2016, Petitioner filed an application for post-conviction relief alleging the following grounds for relief:

1. Ineffective assistance of counsel for failing to object to prosecutor's prejudicial remarks;

2. Prosecutorial misconduct

The State (Respondent) served its return on October 17, 2016, requesting an evidentiary hearing. Petitioner filed an amended application on May 30, 2017, indicating his intention to proceed on the following allegations:

1. Ineffective assistance of counsel for failing to object to prosecutor's prejudicial remarks.
2. Failure to introduce a drawing by one of the victims.
3. Failure to call one of the victim's friends as a witness.
4. Failure to call applicant's wife regarding her calendar that she habitually and meticulously kept and logged dates on, which would indicate the incidents occurred when the children were with their father.
5. Failure to challenge how Victim 2 came up with the dates of the incidents.
6. Failure to raise the issue that Judge Griffith had a conflict of interest. Judge Griffith had previously represented Victim 2's grandparents while in private practice.

An evidentiary hearing was convened on June 6, 2017, before the Honorable G. Thomas Cooper, Jr., circuit court judge. Petitioner was present and represented by Ashley McMahan, Esquire. Respondent was represented by Assistant Attorney Justin Hunter of the South Carolina Attorney General's Office. At the hearing, Petitioner testified and testimony was presented from trial counsel Chelsea McNeil and Claude Howe. By written order filed on August 21, 2017, the court denied and dismissed Petitioner's application for post-conviction relief. The court found, with regards to Petitioner's first allegation, an objection to the prosecutor's statements during

closing arguments would not have changed the outcome of the trial. The court found Petitioner's trial counsel's testimony credible regarding his second allegation that the drawing that was not introduced would not have helped Petitioner's case and Petitioner failed to meet his burden to show how the introduction of the drawing would have changed the outcome of the trial. The court also found Petitioner failed to meet his burden on his third allegation regarding the failure to call the victim's friend as a witness. The court believed trial counsels' testimony stating they interviewed the witness, but later made the strategic decision to not call the witness. Further, Petitioner did not produce the witness at the post-conviction relief hearing and, therefore, could not meet his burden. Petitioner also failed to meet his burden on his fourth allegation and the court found trial counsels' testimony credible that Petitioner's wife's calendar contained material harmful to Petitioner's defense, did not provide an alibi, and did not indicate where the victims were at the time of the incidents. Finally, the court found Petitioner failed to meet his burden to show Counsel McNeil's cross-examination of Victim 2 was deficient and how a different cross examination strategy would have caused a different outcome in the trial.

Petitioner filed a notice of appeal. On June 11, 2018, Petitioner served its Petition for a Writ of Certiorari. This Return to Petition for a Writ of Certiorari follows.

STATEMENT OF FACTS

The older victim (Minor 1) testified Petitioner's wife is her aunt, and she started living with them when she was approximately ten years old. When she was thirteen, Petitioner started sticking his hands under her clothes, and touching her breasts and "private parts." She stated he did it on more than one occasion, but she did not report them at the time because she did not want to hurt her aunt. She finally told her aunt after her cousin (Minor 2) revealed Petitioner molested her too. (Appx. 97-102.)

Minor 2 testified Petitioner started touching her in ways that made her uncomfortable when she was eight years old. She stated he touched her inside her pants, rubbed her and put "toys" that "vibrate" inside her. She eventually told Minor 1 about the abuse because she "couldn't hold it in any longer." (Appx. 131-137.)

Petitioner testified Minor 1 and Minor 2 were lying, and he never molested them. He stated they were upset with him because he disciplined them. On cross-examination, he confirmed the existence of the vibrator described by Minor 2, as well as its location on a shelf in a shoe box. (Appx. 192-203, 208-216.)

The jury convicted Petitioner on two lewd act charges as to Minor 2, and acquitted him on the remaining three lewd act charges as to Minor 1. The circuit court sentenced him to concurrent sentences of ten years incarceration on each conviction. (Appx. 261-262, 271.)

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

The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the State's closing argument.

Petitioner asserts trial counsel was constitutionally ineffective for failing to object to several statements in the State's closing argument and the post-conviction relief court erred in denying him post-conviction relief. However, as the post-conviction relief court correctly held, the State's closing arguments did not rise to the level of impropriety as to warrant a new trial, and additionally, the court found that an objection to the State's comments would not have changed the outcome of the trial. Petitioner failed to meet his burden as he cannot show how trial counsel was ineffective during the trial, or how objecting to the statements during the closing argument would have changed the outcome of the trial. Therefore, Petitioner is not entitled to relief and this Court should deny certiorari.

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.

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 5432, 586 S.E.2d 153 (2003). A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Webb, 389 S.C. 174, 178-179, 697 S.E.2d 153, 156 (Ct. App. 2003). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not 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.” Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). “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.” Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Petitioner has failed to prove counsel’s performance was constitutionally ineffective, as the State’s closing argument was not improper and did not result in a denial of due process. Petitioner argues the following portions of the State’s closing argument were improper:

There is not a cat or mouse in the box. There is a man holding the box and [he] is a child molester. We can talk all we want, we can use legal terms, we can play our games. But when the rubber meets the road one question you have got to answer, who is telling the truth. Somebody sits in that chair and swore to tell the truth and then balled faced lied to you.

And Ricky Dale Pace then got on that stand and looked at them and said, they are liars.

Let’s face it, I was watching one of the shows on, I don’t know if it was National Geographic or what. There is a leopard that killed a water buffalo. My gosh, that water buffalo is a great big two ton beast. Because they don’t go after the healthy and strong. They find the weak, they find the children, they cut them away where they are unprotected and they get them. The child molester goes after the weak, they go after the children when they are not protected, that is when they do it because they know, the worse is going to happen if she tells.

Ricky Dale Pace is a person, he lives here, he is a child molester. You are not going to be able to go to that room and change the fact that he is a person or that he molested these children. ...You come back with a verdict of guilty because that speaks the truth in this case. And that is all we want is, for you to speak the truth. You don’t have somebody to reward, you don’t have somebody to punish. This isn’t me versus them, this is not the State versus the defense, this is about doing right. ...This is about justice, this is about our community, this is about these little girls that shouldn’t have to grow up experiencing what they did. You can’t change what they have experienced. But we can protect our community now.

(App. 231, 232, 238, and 242). Petitioner asserts that he received ineffective assistance of counsel because trial counsel failed to object to the State’s closing remarks, which Petitioner characterizes

as prejudicial, improper, and objectionable, and the post-conviction relief court erred in denying relief.

The post-conviction relief properly denied relief because the State's comments during closing argument did not rise to the level of impropriety as to warrant a new trial, nor did Petitioner meet his burden to show how Petitioner was prejudiced by the State's comments. Further, the comments did not prevent Petitioner from receiving a fair trial.

State's closing argument calling Petitioner a "child molester"

Petitioner argues the solicitor's comments referring to him as a child molester were improper and prejudicial because labeling Petitioner as a "child molester" appeals to the jury's personal biases and emotions. The solicitor refers to Petitioner as a child molester three times during the closing arguments. Petitioner was charged with five counts of lewd acts on a child and the State's reference to him as a "child molester" during the closing arguments is merely surmising what the State believed the evidence presented at trial proved. In State v. Pitts, the Court held, "The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such." State v. Pitts, 256 S.C. 420, 428, 182 S.E.2s 738, 742 (1971). In this case, the few comments the State made calling Petitioner a "child molester" is merely providing the jury with the conclusion the State believes their evidence proved and the inferences the jury can draw from the evidence adduced during trial since more than one child testified Petitioner did indeed molest them. Therefore, the State referring to Petitioner as a "child molester" was not improper or prejudicial.

State's closing argument comparing Petitioner to an animal preying on the weak

Petitioner further asserts the State compared Petitioner to an animal preying on the weak during their closing argument. The State specifically said, "There is a leopard that killed a water buffalo. My gosh, that water buffalo is a great big two ton beast. Because [child molesters] don't go after the healthy and strong. They find the weak, they find the children, they cut them away where they are unprotected and they get them." (Appx. 240.) The State's analogy here was providing an explanation of how a child molester targets a victim. Again, the State's theory is that Petitioner was guilty of molesting two juveniles, so this analogy is not outside the inferences that can be drawn from the evidence presented in the State's case.

In Randall, the solicitor equated Corey Randall and his co-defendant to "cockroaches" during his closing argument. Randall and his co-defendant were on trial for, and ultimately convicted of, trafficking in crack cocaine and possession with intent to distribute crack cocaine within the proximity of a school. In closing the solicitor stated, "That's what I think of dope dealers ladies and gentlemen, the only way I can think of them is like cockroaches. And if that sounds foul to you, it should. Cause drug dealers are filthy just like cockroaches...And one thing about cockroaches [that is certainly true] is they hate the light. Particularly the blue kind like the ones that stopped these two fellows...But the thing that makes them worse than cockroaches is the fact they're human beings." Randall, 356 S.C. 639, 591 S.E.2d 608. This Court did not find the solicitor's comments deprived Randall of a fair trial. Id. Additionally, this Court pointed out that the objected-to comments were isolated to ten lines of the transcript and not pervasively used throughout the trial. Id. Similarly, in the case at bar, the solicitor's comments were also isolated to a few lines during the closing arguments, and did not deprive Petitioner of a fair trial.

Petitioner relies on White¹ arguing the State's closing argument in this case is similar to the State's closing argument in the case at bar. This comparison is improper as the solicitors in the White made highly inflammatory remarks and blatantly threatened the jury during their closing arguments. In White the State said, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them what would you do?" The State in that case also made numerous comments during their closing asking the jury to imagine their mothers, daughters or wives as the victim in the brutal rape case. Here, the State's comments did not ask the jury to imagine Petitioner being in their homes or with their children and the State never made a comment about the jurors imagining the victims in this case were their own children. The State's closing argument is highly distinguishable from the closing argument provided by the State in White.

Petitioner's reliance on Northcutt² is also improper as it too is highly distinguishable from Petitioner's case. In Northcutt, the Appellant argued:

[T]he solicitor violated this well-established rule³ by (1) crying numerous times throughout the argument; (2) telling the jury "we will kick the baby some more" if they returned a life sentence; (3) dehumanizing Appellant ("I don't even call him a person"); (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]"); (5) declaring an "open season on babies"; (6) telling the jury he "expects" the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby's crib.

Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). The court found three of the solicitor's arguments outlined by Appellant required reversal. First, the solicitor's comment declaring an "open season

¹ State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965).

² State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007).

³ S.C. Code Ann. §16-3-25(C)(1) (2003).

on babies”; second, the solicitor’s comment that he “expects” the death penalty; and third, the solicitor’s production of a baby carriage covered in a large black shroud during a staged funeral procession in the courtroom. *Id.* at 223. The court found, “Any one of these three miscues requires reversal of Appellant’s sentence.” *Id.* at 224.

In the case at bar, the State did not exhibit any of the conduct that was found to be inflammatory or prejudicial in *Northcutt*. Petitioner cites *Northcutt* to support the notion that the State’s reference to “protect[ing] our community” in closing arguments rises to the same egregious conduct as what was displayed in that case. Here, the State did not cry, did not tell the jury it *expects* them to return a guilty verdict, did not threaten the jury by stating a not guilty verdict creates an open season on children, and did not insinuate that returning a not guilty verdict would additionally harm the victims. The comparison by the Petitioner between the case at bar and these two cases is meritless.

State’s closing argument accusing Petitioner of lying on the stand

Petitioner also asserts the State told the jury during their closing argument that Petitioner lied on the stand and Petitioner contends that comment was improper and prejudicial. In the closing argument the State said, “But when the rubber meets the road one question you have got to answer, who is telling me the truth. Somebody sits in that chair and swore to tell the truth and then balled face lied to you. ...All you have to do is decide who is telling you the truth.” (Appx. 233.) The State never came out and stated the person who lied was Petitioner. The State was explaining to the jury they have to weigh the testimony provided by the various witnesses and determine who is more credible. The State also went on to state Petitioner is presumed innocent and the presumption of innocence cannot be touched or removed by the State. (Appx. 239.)

Petitioner not prejudiced by the State's closing argument

Although the State's comments during closing were proper, Petitioner has also failed to meet his burden of proving he was prejudiced. Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the petitioner 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)).

Here, the jury was able to consider and weigh the testimony of the Petitioner, juvenile victims, a pediatrician, and numerous other witnesses during their deliberations. The jury returned a verdict that acquitted Petitioner on three of the five charges. Had the jury been so influenced by the State's alleged improper, prejudicial statements during the closing argument, it is unlikely they would have been able to reach a verdict that acquitted Petitioner of any charges. Additionally, during the post-conviction relief hearing, Ms. McNeil was asked if she believes the State calling Petitioner a child molester made a difference in the case and she responded, "No because we got three not guilty verdicts." (Appx. 308.)

Furthermore, the trial judge effectively cured any alleged impropriety by the State during its jury instructions on credibility and presumption of innocence. Particularly, the trial court instructed the jury in part as follows:

[T]he defendant, Ricky Dale Pace, comes into this court clothes with a presumption of innocence. And this presumption goes with him and stays with him throughout the case and entitle him to a verdict of not guilty unless and until it is dispelled by evidence satisfying you, the jury, beyond a reasonable doubt that the State has proved each and every element of the alleged crimes beyond a reasonable

doubt and that the defendant is guilty of all of the offenses charges, charged.

The trial judge further instructed:

Since you are...weighing the facts you must likewise judge the credibility of the witnesses who have been called in this case. Now credibility is believability. So you are judge the believability of the witnesses who have testified from the witness stand over the last day and a half. ...You may believe part of a [witness's] testimony and disbelieve the rest. ...You must still gauge the credibility of the witness to determine the believability or the truth of the facts offered through that testimony.

Petitioner has not challenged the validity of the trial court's instruction. It is clear from the instructions, the jury was made aware that Petitioner is presumed innocent in this case and instructed on the proper weight to give witness testimony. Any potential error by the State was cured by the trial judge's jury instruction. The jury weighed the evidence against Petitioner and found him guilty two counts of lewd acts on a child and acquitted him of three counts of lewd acts upon a child. From the jury's findings, it is clear the State's closing argument did not infect the trial with such unfairness as to make the conviction a denial of due process. Therefore, Petitioner failed to meet his burden of proof and the post-conviction relief court properly denied relief.

CONCLUSION

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

Respectfully submitted,

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RICKY DALE PACE,

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STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Taylor Davis Gilliam, Esquire
Post Office Box 11589
Columbia, South Carolina 29201

This 12th day of October, 2018


CARLOTTA L. WEAVER
Legal Assistant



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OCT 12 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 12, 2018

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

Re: Ricky Dale Pace v. State of South Carolina
Appellate Case No. 2017-002004
Lower Court Case No. 2016-CP-30-551

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/clw
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)