

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID E. ROSIER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001091

PETITION FOR WRIT OF CERTIORARI

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PETITIONER
S.C. SUPREME COURT

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ISSUES PRESENTED

I. Trial counsel erred in failing to present in the proper tribunal appellant's objection to the admission of a collection of jail telephone calls that would presumably have been offered into evidence on the ground that the same violated the Homeland Security Act.

II. Trial counsel erred in objecting to the solicitor's closing plea to the jury stating that a guilty verdict would be "an important one for this community" as a golden rule violation because this was actually an impermissible conscious of the community argument that was condemned as reversible error in State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999).

STATEMENT

Petitioner David E. Rosier, Jr., was convicted of voluntary manslaughter and possession of a weapon during the commission of a violent crime during the October 2013 term of the Aiken County General Sessions Court before Judge Doyet A. Early, III, and received an aggregate thirty-year prison sentence. App. 1-458. Wallis A. Alves and C. David Hayes represented petitioner at trial, and Assistant Solicitors Kevin Molony and David W. Miller appeared on behalf of the state.

Petitioner appealed, but his convictions and sentences were affirmed on June 3, 2015, by the South Carolina Court of Appeals. See State v. Rosier, Jr., Op. No. 2015-UP-275 (S.C. Ct. of App. June 3, 2015). App. 460-463. On February 16, 2016, the South Carolina Supreme Court denied the petition for writ of certiorari filed in the direct appeal.

On October 11, 2016, petitioner filed a PCR application at the Aiken County Office of the Clerk of Court. App. 464-470. The respondent filed a Return dated December 28, 2017, and on May 7, 2018, a PCR hearing was held at the Aiken County Courthouse before Judge R. Scott Sprouse. App. 417-478; App. 483-543. Petitioner was present at the hearing and represented by Lance Boozer, and Assistant Attorney Julie Coleman appeared on behalf of the state.

On June 1, 2018, Judge Sprouse issued an Order of Dismissal denying and dismissing petitioner's PCR claims. App. 545-558. Petitioner appealed Judge Sprouse's Order of Dismissal. This petition follows.

QUESTION I

Trial counsel erred in failing to present in the proper tribunal appellant's objection to the admission of a collection of jail telephone calls that would presumably have been offered into evidence on the ground that the same violated the Homeland Security Act.

In this case, petitioner and his son Joshua entered the Blackmon's residence where an altercation erupted, and where petitioner responded by fatally shooting DJ in the chest as he sat on the couch. Petitioner testified that his son Joshua and the man on the couch (DJ) began fighting and at that same time, he (petitioner) and Blackmon, who pointed a pistol at him and his son Joshua, began fighting over the pistol until it fired and hit DJ. App. 350, l. 15 – p. 373, l. 17. Petitioner's son, Joshua Rosier, testified that petitioner shot DJ after taking the gun from Blackmon. App. 146, l. 10 – p. 179, l. 3. Petitioner's other son, Calvin Rosier, sat in the car while petitioner and Joshua went inside the house. App. 271, l. 17 – p. 278, l. 20.

Defense counsel moved for a continuance prior to trial in light of the fact that there was no time to review the jail calls made between petitioner and both of his sons, and that the jail calls should be suppressed as evidence because the calls constituted unlawful wire communication interceptions that violated the Homeland Security Act. App. 42, l. 3 – p. 48, l. 23. The trial judge denied the continuance motion and ruled that the Homeland Security Act had not been violated. App. 60, lines 1-7.

During the PCR hearing held in the case, defense counsel admitted that she failed to make the Homeland Security violation motion prior to trial and before a three-panel appellate court setting as required by statute. Defense counsel explained that self-defense and the defense of others comprised the theory of petitioner's case, which was that the events were unplanned and happened suddenly; and that a week prior to trial, she received information that petitioner's

sons changed their statements based on the content of their jail cell telephone conversations (indicating that this violence was all planned and prearranged), and that the theory of the state's case also changed under the view that the violence was prearranged and preplanned; and that as a result, she moved to suppress the jail call tapes under the Homeland Security Act, but admitted she made a mistake in failing to raise the Homeland Security Act before the Court of Appeals where jurisdiction was proper on this issue rather than raising the same before the trial court where jurisdiction was improper. App. 507, l. 21 – p. 518, l. 21. The Homeland Security issue was raised on direct appeal, but relief was denied on appeal based on the following:

We find the court did not have jurisdiction to determine whether the calls should be suppressed under the Act. *See* § 17-30-110(A)(I) (“Prior to any trial, hearing, or proceeding in or before any court... any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication or evidence derived therefrom, on the grounds that the ...communication was unlawfully intercepted....”); §17-30-110(A) (requiring any such motion be made to the “reviewing authority” before trial “unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion”); § 17-30-15(9) (defining “[r]eviewing authority” as “a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals”); *State v. Whitner*, 399 S.C. 547, 551, 732 S.E.2d 861, 863 (2012) (finding a trial court lacked subject matter jurisdiction to suppress evidence under the Act because such motions must be made before a panel of judges of the court of appeals). Therefore, the trial court’s ruling denying the motion to suppress is void. *See DeWitt v. S.C. Dep’t of Highways and Public Transp.*, 274 S.C. 184, 187, 262 S.E.2d 28, 30 (1980) (“The acts of a court without jurisdiction are without effect.”). However, because Rosier never made a motion to this court prior to trial as the statute requires and he does not assert he did not have an opportunity to make the motion at the appropriate time, we find he waived his opportunity to seek a determination as to whether the jail phone calls should be suppressed. *See* §17-30-110(A) (requiring motions to suppress be made to this court before trial “unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion”). We note the trial court’s denial of Rosier’s motion for a continuance did not prevent Rosier from making his motion to suppress to this court. Had Rosier moved this court to suppress the recordings, the trial would have been stayed pending this court’s ruling, making the continuance for the purpose of making his motion to this court unnecessary. *See id.* (“All proceedings requiring the use of the contents of any intercepted communication that are the subject of the motion to suppress pursuant to this section are automatically stayed pending the determination of the motion to

suppress.”). Furthermore, after the trial court initially denied Rosier’s motion for a continuance, he informed the trial court that its ruling did not address the issue of making a motion to suppress under the Act. He stated the court of appeals was the statutory reviewing authority for such a motion to the court of appeals; nevertheless, he proceeded to argue the merits of the issue. Given that Rosier acknowledged the court of appeals was the reviewing authority for such a motion yet sought a ruling from the trial court anyway, he cannot complain on appeal of an error his own product induced. *See State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct has induced.”).

The PCR judge ruled that counsel’s error yielded no prejudice because counsel’s testimony was that she would have made the exact Homeland Security violation argument to the Court of Appeals that she made in the circuit court, and that there was no proof in effect that the appellate court would have ruled in favor of the defense and/or that the suppression of the jail calls would have altered the jury’s verdict. App. 551-555.

S.C. Code Ann. §17-3-110 states that prior to any trial, hearing or court proceeding, challenging any intercepted wire, oral, or electronic communication as unlawful and without approval must be brought before a panel of three judges from the South Carolina Court of Appeals per S.C. Code Ann. §17-30-15(9). In the instant case, counsel brought up the issue before the wrong tribunal.

The jail calls between petitioner, Joshua, and Calvin and the changing stories between Josh and Calvin as supported by the jail calls bore on petitioner’s credibility with respect to his testimony and his defenses (self-defense and defense of others), and that but for the jail calls, the credibility questions, which influenced the nature of the case, would have been eliminated. This meant that the jail calls, which in effect indicated that the events at the residence were preplanned¹, rendered the suppression of the jail calls crucial to the defense, and but for counsel’s error in bringing the Homeland Security issue before the wrong tribunal, a reasonable

¹ App. 151, l. 13- p. 154, l. 19; App. 283, l. 6- p. 284, l. 4; App. 298, l. 1- p. 301, l. 17.

probability exists that the jail calls evidence might have been suppressed and thus the outcome of petitioner's trial would have been different (or the outcome of the appeal would have been different). Thus, counsel's deficient representation of petitioner regarding the mishandling of the Homeland Security issue in the case violated petitioner's right to competent criminal legal representation in violation of the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668 (1984).

QUESTION II

Trial counsel erred in objecting to the solicitor's closing plea to the jury stating that a guilty verdict would be "an important one for this community" as a golden rule violation because this was actually an impermissible conscious of the community argument that was condemned as reversible error in State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999).

The solicitor's closing remark in question as follows:

Your decision in that you're going to make in this case is important. It's an important one for the family and friends of [the deceased]. It is an important one for this community.

App. p. 417, lines 2-5.

During the PCR hearing, trial counsel testified that she believed this was a Golden Rule error. App. 525, l. – p. 527, l. 12. The Attorney General argued that the remark was not a Golden Rule violation. App. 539, l. 20 - 540, l. 12.

The PCR judge ruled that the argument was the solicitor's argument was not prohibited and thus in effect there was no reason for a Golden Rule objection or any objection at all. App. 555-556.

The solicitor's comment was not a Golden Rule violation, but rather an impermissible conscious of the community violation. In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999), where the solicitor's closing remarks asking the jury if giving the defendant the reasonable doubt would end up keeping drugs on "our streets," led to the Court's holding that a prosecutor may not urge jurors to convict a defendant to protect community values, preserve civil order, or deter future lawbreaking because of the possibility of convictions being handed down for reasons wholly irrelevant to guilt or innocence. The Liberte Court went on to hold that:

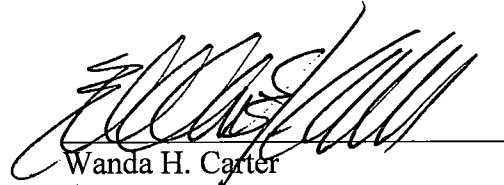
Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear. *United States v. Monaghan*, 741 F. 2d 1434, 1441 (D.C.Cir. 1984), cert denied, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); see also *United States v. Hawkins*, 595 F.2d 751, 754 (D.C.Cir. 1978)(Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."), cert denied, 441 U.S. 910, 99 S.Ct. 2005, 60 L.E.2d 380 (1979); *United States v. Barker*, 553 F.2d 1013, 1025 (6th Cir. 1977) ("[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community."); cf. *State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (finding solicitor's closing argument urging that "law officers who risked their lives in [the defendant's] recapture would be aggrieved by a sentence less than death" and implying that "other citizens of Lexington County including himself would strongly disapprove of a life sentence," to be improper, noting that "[j]urors are simply not to consider the opinions of neighbors, officials or even other juries") (emphasis added), cert. denied, 460 U.S. 1088, 103 S.Ct 1784, 76 L.Ed.2d 353 (1983), overruled in part on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *United States v. Radka*, 904 F.2d 357, 361 (6th Cir. 1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'").

Here, the solicitor's conscious of the community argument violated Liberte and therefore; counsel erred in failing to make a Liberte objection, which in turn constituted ineffective assistance of counsel in violation of the Sixth Amendment and Strickland, supra. But for this

error, a reasonable probability exists that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner would request that this Court grant the petition and allow full briefing in the above-raised issues.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

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IN THE SUPREME COURT

Certiorari to Aiken County

Honorable R. Scott Sprouse, Circuit Court Judge

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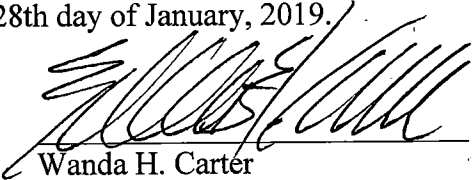
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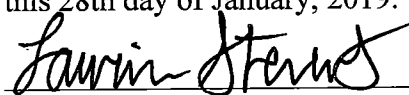
CERTIFICATE OF SERVICE

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 a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on David Eugene Rosier, #141435, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of January, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 28th day of January, 2019.



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