

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Honorable Thomas A. Russo, Circuit Court Judge

TROY DARNELL HUNTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002110

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- 1.) Trial counsel erred in failing to request a charge on the lesser offense of robbery in the case, particularly in light of the fact that the jury sent out a note requesting guidance because they were split on the question of whether petitioner was guilty or not guilty of armed robbery.

- 2.) Trial counsel erred in failing to call Charles Hunter, who would have stated that there was no gun at the crime scene, as a witness for the defense on the ground that his strategy was that petitioner was not present at the crime scene because there were a total of four eyewitnesses who testified at trial on behalf of the state and claimed that petitioner was present at the scene.

- 3.) Trial counsel erred in failing to object to the solicitor's closing comments that constituted improper bolstering of the witness who had been injured.

- 4.) Trial counsel erred in failing to object to testimony of the dentist who gave his opinion as to the specific origin of Holloman's teeth injuries where such an opinion was beyond the expertise of the witness because he was not qualified to expound on this particular issue.

STATEMENT

Petitioner Troy Darnell Hunter was tried by jury during the January 2013 term of the Florence County General Sessions Court before Judge D. Craig Brown and convicted of armed robbery and second degree assault and battery. Judge Brown sentenced petitioner to imprisonment for an aggregate period of thirty years. App. 1-312. Petitioner was represented at trial by Steven Deberry and Assistant Solicitor Matthew Ozment appeared on behalf of the state.

Petitioner appealed his convictions and sentences. After briefs were filed (App. 316-361), the South Carolina Court of Appeals issued an opinion affirming petitioner's convictions and sentences. App. 362-363. See State v. Hunter, Unpublished Opinion No. 2014-UP-437 (S.C. Ct App. filed December 3, 2014).

On January 8, 2015, petitioner filed a PCR application with the Florence County Office of the Clerk of Court. App. 364-374.

The respondent filed a return dated November 21, 2016, requesting that a hearing be held in response petitioner's PCR action. App.375-378. Petitioner filed an Amended PCR application on April 27, 2017. App. 380-395.

A PCR hearing was convened on August 31, 2017, at the Florence County Courthouse before Judge Thomas A. Russo. Petitioner was present at the hearing and represented by Jonathan P. Waller and Assistant Attorney General Lindsey A. McCallister appeared on behalf of the state. App. 396-462.

On October 18, 2018, Judge Russo issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of counsel in his case. App. 464-480.

Petitioner appealed. This petition follows.

QUESTION I

Trial counsel erred in failing to request a charge on the lesser offense of robbery in the case, particularly in light of the fact that the jury sent out a note requesting guidance because they were split on the question of whether petitioner was guilty or not guilty of armed robbery.

In the case at bar, petitioner was charged with taking money from Demetrius C. Holloman while armed with a deadly weapon (“to wit a .357 handgun). App. 482. At trial, Roderick S. Titus testified that he and Holloman had just returned to his (Titus’) residence on the afternoon of November 30, 2011, after having attended a funeral, and that he (Titus) went inside, but Holloman went outside to smoke a cigarette. Immediately thereafter, Titus stated that he heard a loud noise (hand clap or crash), but did not know for sure if the noise was the sound of gunfire. App. 59, 1.9-p. 70, 1.5.

Nathan Orgban testified that he was present at the scene near Titus’ residence on the day in question, and that he saw petitioner and Holloman fighting and witnessed petitioner use his fist to punch Holloman. App. 83, 1.9-p.88, 1.20.

Idena Titus Simmons testified that she lived nearby, and that on the day in question she heard a commotion outside that sounded like a loud noise similar to the sound of a transmitter or a truck hitting a pole, but added that she did not see petitioner at the scene and apparently neither saw or knew what the loud noise was exactly. App. 108, 1.22-p.112, 1.21.

Deloris Titus Johnson testified that she was present at the scene after the funeral, and that she saw petitioner in the area, and that she heard gunshots, and that she heard people pass by as they fled. App. 118, 1.17-p.124, 1.24.

Demetrius Holloman testified that he was present at Roderick Titus’ house after the funeral on that day and remembered that while smoking a cigarette outside, “[petitioner] came

behind [him]...swinging...and hit [him] in the mouth with a .357,” and then stood over him while holding the gun, and fired the gun, and then took his money from his pants pocket.

Holloman stated that he lost six teeth as a result of this incident. App. 132, l.1-2; App. 127, l.18-p.139, l.23.

Debra Singleton, who was Holloman’s mother, testified that Holloman told her that petitioner hit him in the mouth with a gun.¹ App. 170, lines 10-21.

During the PCR hearing held in the case, petitioner testified that he asked trial counsel why the state would drop the gun charge, but still move forward on the armed robbery charge.² App. 444- l.24-p.445, l.7. Note that the trial judge did not charge the lesser offense of robbery in the case.

The PCR judge ruled that counsel’s strategy with respect to the jury charge (armed robbery and/or robbery) was not ineffective because counsel’s argument was that theory of the case was to deny that a robbery ever occurred at all and that if it did occur, then there was no gun and therefore “[counsel] didn’t want to give them the option of finding [petitioner] guilty on the lesser included offense in lieu of armed robbery” in the case. App. 476-477.

¹ On appeal, the issue raised was whether the trial judge erred in allowing Holloman’s mother to testify in reference to the identity of the assailant (petitioner) based on hearsay based on Holloman’s conversations with his mother about the incident. App. 317-333.

² Petitioner was indicted on the offenses of armed robbery, attempted murder, second degree assault and battery and possession of a firearm during the commission of a violent crime. Petitioner was tried on the armed robbery and assault charges, and the remaining charges were dismissed.

Trial counsel testified at the PCR hearing and admitted that there was evidence that the incident occurred without the involvement of a weapon, and that the trial judge charged that one's fist might qualify as a deadly weapon. Counsel explained that he did not request a charge on the lesser offense of robbery in this case based on the following rationale:

Q Was there any evidence that the robbery took place, but then there wasn't a weapon involved, that it was just a strong armed robbery?

A Yeah, I think there was a witness named Nate Orgbon or something and he testified that he didn't see a weapon.

Q Okay. Well, during the charge conference, you objected to Judge Brown charging the jury with strong armed robbery?

A I did.

Q Okay. And he refused to charge it. He said there is no evidence presented that there was a strong armed robbery. It was either straight up or down on armed robbery; is that correct? That's your recollection?

A My reason for not wanting strong armed robbery is because I didn't think they had prove—there was two situations that I thought were likely. number one was that they didn't—it's possible that they didn't prove a robbery at all because of the inconsistencies and the lack of evidence and the inconsistencies in the victim's statement. And two was that if they did believe an altercation took place, then I thought it was likely that they may not have believed there was a gun involved.

...I thought they either believed that this may not have happened or that it may have happened without a gun. P. 411, l.16-p.412, l.17.

In the case of State v. Gourdine, 322 S.C. 396, 472, S.E.2d 241 (1996), the Court held that the trial judge erred in not charging the lesser offense of accessory before the fact of robbery in addition to the charge of accessory before the fact of armed robbery, and went on to reiterate the rule that the lesser offense of robbery must be charged where there is evidence from which it

could be inferred that the lesser rather than the greater was committed. See State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1989). Armed robbery occurs when a person commits robbery while armed with a deadly weapon (see S.C. Code Ann. {16-11-330) and the lesser offense of armed robbery is robbery, which is the felonious or unlawful taking of money, goods, or other personal property against another's will or without consent (larceny by force) State v. Moore, 374 S.C. 468, 649 S.E.2d 84 (2008), citing to State v. Al-Amin, 353 S.C. 405, 578 S.E.2d (Ct. App. 2003) and State v. Scipio, 283 S.C. 124, 323 S.E.2d 15 (1984).

Here, petitioner's case boiled down to whether a gun was used, or whether a fist was used, or whether neither had been used to accomplish larceny by force based on the testimony; but yet the judge's charge did not reflect a jury instruction for each of the evidentiary scenarios presented in the case.

For example, Officers Lee Davis and Andrew Brown both testified that they viewed the crime scene and saw no shell casings, no teeth, and no blood at the crime scene. App. 97, l.13-p.99, l.24. App. 187, lines 15-16. Roderick Titus stated that he saw no missing teeth and no gun in the area after the incident. App. 75, l.7-17. Eyewitness Nathan Orgbon testified that he witnessed the fight between petitioner and Holloman and that he saw no gun in petitioner's hand. App. 90, l.9-20. Two witnesses testified that they heard a sound that might have been gunfire or a loud crash, but stated they saw no gun. App. 116, l.14-p. 117, l.9, App. 125, l.15-p. 126, l.3. Note further that the jury questioned whether the case was robbery or armed robbery by asking "what happens when there is split decision in an [armed robbery] charge, see Court's Exhibit at App. 315. Thus, the presence or absence of a deadly weapon was central to the case and there was sufficient proof beyond a reasonable doubt that no deadly weapon existed and that robbery was the only offense, if any, or at best, that was committed in the case.

Trial counsel's error in failing to request a charge on the lesser offense of robbery constituted deficient legal representation, and but for the error, a reasonable probability exists that the outcome of petitioner's trial would have been different, i.e., the possibility of a jury verdict on the lesser offense of robbery, especially since the jury had been deadlocked on whether he was guilty of armed robbery. See Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984).

QUESTION II

Trial counsel erred in failing to call Charles Hunter, who would have stated that there was no gun at the crime scene, as a witness for the defense on the ground that his strategy was that petitioner was not present at the crime scene because there were a total of four eyewitnesses who testified at trial on behalf of the state and claimed that petitioner was present at the scene.

During the PCR hearing, petitioner testified that he informed trial counsel of Charles Hunter as a potential defense witness in the case and that he wanted him to testify, but that counsel only promised to call him as a witness if needed and keep insisting that calling Charles Hunter would give the state ammunition. App. 443, 1.12-p.444, 1.10, App. 445, 1.8-18; App. 449, 1.11-17. Ultimately, Charles Hunter was not called to testify at petitioner's trial. Apparently, counsel's strategy was to argue that petitioner was not present at the crime scene despite the fact that four of the state's eyewitnesses testified that they saw petitioner there at the crime scene.

Charles Hunter testified at the PCR hearing and explained that he saw petitioner and Holloman fighting at the crime scene and that petitioner hit Holloman in the mouth, but that the gunshot that was fired had been fired 'behind' them, and that afterwards everyone departed from the scene. Hunter stated that petitioner had no gun on him. App. 429, 1.9-p.438, 1.15.

Trial counsel testified at the PCR hearing regarding the matter and stated that there was insufficient proof beyond a reasonable doubt that this was an armed robbery or that an altercation occurred, especially since no blood was found at the scene. App. 405, 1.21-p.406, 1.4. Counsel testified at the PCR hearing on this subject as follows:

“It was kind sketchy as to whether or not...this incident even took place...[and] by calling Charlie Hunter, we would have acknowledged that it did take place, but we would just be saying that it didn’t take place with a gun.” App. 406, lines 4-9.

Also, counsel added that he didn’t want to admit to lose the last argument. App. 406, 1.11-14. Counsel stated that he “didn’t think the state had proven beyond a reasonable doubt that this incident even took place when and where and how they said it did...and so by calling Charles Hunter, then [they] would have been admitting that this incident actually took place.” App. 410, 1.19-23. Note that counsel admitted that Hunter would have testified that petitioner fought at the scene, but that petitioner had no gun. App. 418, 1.24 - p. 419, 1.4. Also trial counsel admitted further that Charles Hunter that he was available to testify. App. 428, lines 2-11.

The PCR judge ruled that petitioner did meet his burden of proving prejudice with respect to counsel’s strategic decision not to call Charles Hunter as a defense witness at trial. App. 472-474.

Clearly, petitioner’s presence at the scene was not the central issue in the case because four of the state’s eyewitnesses testified that petitioner was present at the scene. App. 118, 1.17-p.124, 1.14 (Delorris Titus Johnson); App. 59, 1.9-p.70, 1.5 (Roderick S. Titus); App. 83, 1.9-p.88, 1.20 (Nathan Orgbon); App. 127, 1.18-p.139, 1.23 (Demetrius Holloman). The assertion that petitioner was not at the scene was an untenable argument to advance in the case. Rather, to the

contrary, the central issue that was whether petitioner was armed during the fight and whether Charles Hunter would have corroborated the fact that petitioner was unarmed during the fight.

A defendant has a right to present witnesses in his defense. Faretta v. California, 422 U.S. 806 (1975); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). See Buckson v. State, 423 S.C. 313, 815 S.E.2d 436 (2018), where the Court held that counsel erred in failing to call certain witnesses who would have testified that the defendant lived in the same apartment that the state accused him of burglarizing. Also, see Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), where the Court held that trial counsel was ineffective in failing to call as a defense witness a triage nurse who would have corroborated the defendant's lack of penetration defense on a sexual assault charge. See also Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), where counsel erred in failing to call the emergency medical personnel who would have testified that the victim stated immediately after the attack that she did not know her assailant where the victim was the sole witness to the rape. Also, compare, Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), where the Court held that defense counsel performed deficiently in failing to hire an independent expert witness to assess the gun residue evidence, especially where there was evidence that the victim had the gun in question and was ready to fire, but the gun went off after the defendant grabbed it, and where the initial finding was that no gunshot residue appeared on the victim, but a subsequent finding on the question of whether gunshot residue was on the victim resulted in an inconclusive finding.

Here, trial counsel's error in failing to call Charles Hunter as a defense witness to testify on the key issue of whether a deadly weapon was present at the scene constituted ineffective assistance of counsel in violation of the Sixth Amendment and Strickland v. Washington 466 U.S. 668 (1984), and but for this error, the outcome of petitioner's case might have been different.

QUESTION III

Trial counsel erred in failing to object to the solicitor's closing comments that constituted improper bolstering of the witness who had been injured.

During the PCR hearing, the parties addressed the issue of trial counsel's error in failing to object to the solicitor's improper vouching in favor of Demetrius Holloman to the extent that he believed Holloman was telling the truth. Trial counsel stated in effect that the comments by the solicitor in this regard did not rise to the level of an objection. App. 413, 1.13-p.414, 1.13.

The solicitor's erroneous closing argument in question follows:

While many witnesses saw parts of this, many saw it at the start, many saw what happened afterwards, many heard things. The only one who could actually testify as to what went down on the ground literally that day was Demetrius.

So did he tell us the truth. I think he did. In fact, I know he did. He came, told me the same story he told Lee Davis. Now, whether it was \$900, \$960 or thousand dollars. This was cash, it was taken 11 months ago. It doesn't matter. If Troy Hunter took one dollar, it's armed robbery. It doesn't matter. But Demetrius Holloman sat here and Mr. Deberry hounded him and hounded him and tried to get under his skin and did get under his skin and what Demetrius Holloman stick with, You don't understand. You weren't there that day. You didn't have a gun smack your teeth out. You didn't have a gun fire next to your head. He got upset and I understand why he got upset. If this had happened to me and I had the courage to come forward and tell the police living in Demetrius' neighborhood, I be upset too if somebody put me here and sat there and tried to make it look like I was lying over and over sat there and tried to make me look like I was lying. I understand everything Demetrius felt because Demetrius was sitting here telling you the truth. 259, 1.13-p.260, 1.11.

The PCR judge ruled that trial counsel's strategy for not objecting to the improper vouching did not rise to the level of any deficiency in his representation where there was no proof that these comments violated due process or influenced the jury verdicts or tainted the verdicts in the case. App. 477-479.

Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the state to assure the jury of a government witness' credibility; and therefore, a solicitor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Gilchrist v. State, 350 S.C. 221, 565 S.E. 2d 281 (2002). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity. See Gilchrist, supra, citing to State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). In Gilchrist, the Court found that trial counsel was ineffective in failing to object to the solicitor's statement at opening argument that a witness, who was arrested and charged in connection with the defendant in a robbery in the case, was coming "clean" about the incident and what happened and that he (this witness) was therefore in effect believable for coming clean. See also Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016), where the Court held that trial counsel was ineffective in failing to object to the solicitor's closing comments where he improperly vouched for the credibility of the child victim in the case where credibility was the main issue at trial.

As a result, trial counsel's error in failing to object to the solicitor's improper vouching as described above constituted ineffective legal assistance at petitioner's trial such that but for counsel's deficient representation in this regard, a reasonable probability exists that the outcome of the trial based on a ruling per an objection to the same (had it been made) would have resulted in a different outcome in the case at trial. This error by counsel violated the Sixth Amendment

guarantee that criminal attorneys perform competently at trial. See Strickland v. Washington, 466 U.S. 668 (1985).

QUESTION IV

Trial counsel erred in failing to object to testimony of the dentist who gave his opinion as to the specific origin of Holloman's teeth injuries where such an opinion was beyond the expertise of the witness because he was not qualified to expound on this particular fact.

Again, the central fact issue in this case was whether the jury believed Holloman's injuries arose via a hit from a deadly weapon or from no deadly weapon at all. At trial, Dr. James M. Lawhan, who was an oral and maxillofacial surgeon that testified that he met with Holloman, who stated that he had been hit in the mouth with a gun, and assessed the trauma to his face and removed his fractured teeth that were beyond repair. Dr. James opined in effect that Holloman was hit with a gun. Dr. James addressed the ultimate fact issue as follows:

Q These injuries that we have here would they be consistent with just a closed first punch?

A When he told me, he was hit with a gun I would tend to have to believe that because if you look at the mechanism of injury, the actual – if you take a fist, I mean, the average guy fist is about as big as mine. I mean, you're going to create more damage than you would if I could point ahead. But if you have something – mechanisms of injury is about as big a round as this. If you kind of isolate it to one side of the mouth, so I think it would be doubtful that someone could hit someone in the mouth and break off three teeth and avulse two so sharply and not damage the adjacent teeth.

Q Okay. And so you said the mechanism of injuries have to be about that big?

A It had to be condensed. It couldn't be – well --, it's possible but I would lean toward more something being more condense versus a fist.

Q Okay. And now I realized you weren't there and you can't say, but would it be consistent with a gun butt?

A Yes. I would say yes. App. 235, l.15-p. 236, l.10.

Prior to Dr. Lawhan's testimony, defense counsel objected to and moved to exclude Lawhan's testimony as a Rule 5 discovery violation. App. 225, l.2-p.226, l.22. The trial judge suspended the trial in order for defense counsel to review the medical notes and then proceeded with the testimony of Dr. Lawhan. App. 226, l.23-p. 229, l.25.

During the PCR hearing, the issue of the propriety of Lawhan's testimony with respect to this comment on the ultimate fact issue in the case was addressed. Trial counsel testified that he thought he objected to Lawhan's testimony on the ultimate fact question as to how Holloman's petitioner's teeth became fractured. App. 409, l.21-p.410, l.5; App. 407, l.18-p. 410, l.5.

The PCR judge ruled that counsel was not ineffective in not objecting to the expert's testimony "because Lawhorn's opinion testimony as to the mechanism of injury was appropriate to assist the jury with determining a fact in issue and was within the scope of his expertise." App. 475-476.

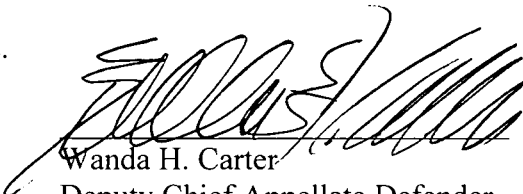
The qualification of an expert witness and the admissibility of the expert's testimony are matters with the trial judge's discretion, but all expert testimony must satisfy Rule 702, SCRE criteria of validity. State v. Mealor, 425 S.C. 625, 825 S.E.2d 53(2019) citing to State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Here, the dentist was qualified only to testify regarding the state and status of and his assessment of Holloman's fractured teeth in general, i.e. which were savable and which were not and why. Clearly, said dentist had not been qualified to give an opinion on the subject of the origin or genesis of how Holloman's teeth became fractured.

Counsel erred in objecting to the dentist's testimony on a Rule 5 violation rather than based on a qualification of the expert objection per Rule 702, SCRE. Had counsel objected on the proper basis, a reasonable likelihood exists that the dentist would not have been allowed to

give an opinion in the central and ultimate fact issue in the case, i.e., whether this was an armed robbery or robbery case, and the outcome of the trial would likely have been different but for the error. Counsel's error regarding this issue constituted deficient representation in violation of the Sixth Amendment guarantee of receipt of competent counsel in a criminal case. See Strickland v. Washington, supra.

CONCLUSION

Based on the foregoing arguments, petitioner would request that this Court grant petitioner's petition on the above-raised issues.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of September, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Florence County

Honorable Thomas A. Russo, Circuit Court Judge

TROY DARNELL HUNTER,

PETITIONER

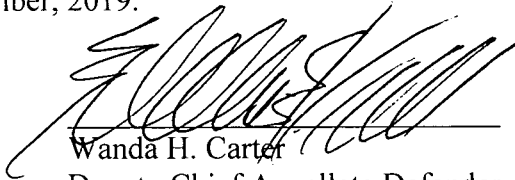
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Lindsey McCallister, 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 Troy Darnell Hunter, #226094, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of September, 2019.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of September, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.

