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May 12 2020

SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
Hon. Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-36-00509

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May 12 2020

S.C. SUPREME COURT

ROBERT ANTWON WRIGHT

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

Appellate Case No. 2019-001220

**RESPONDENT'S PETITION FOR BAIL
PENDING APPELLATE REVIEW**

NOW COMES Respondent Robert Antwon Wright, by and through undersigned pro bono counsel, and does hereby petition this Court for bail pending appellate review, pursuant to Rule 243(k) of the South Carolina Appellate Court Rules ("SCACR"). In support of this petition, Wright avers as follows:

Overview

1. Mr. Wright is currently imprisoned at Kershaw Correctional Institution. For more than four years, he has been in the custody of the South Carolina Department of Corrections based on a conviction for a felony that was *overturned* by a post-conviction relief court nearly a year ago.

2. The post-conviction relief ("PCR") court held that Wright was deprived

of his due process rights by his counsel's failure to object to numerous improper statements made by the State's solicitor during closing arguments. The court reversed Wright's conviction and ordered a new trial.

3. Rather than retry the case, the State filed a petition for certiorari with this Court that did not even attempt to demonstrate that Wright's case is worthy of the Court's discretionary review. Wright submitted a return to the petition, and the State did not submit a reply. This Court transferred the petition to the Court of Appeals, where it awaits further action by that court.

4. This Court should exercise its discretion to grant Wright bail in the meantime. He has a substantial likelihood of prevailing on the State's appeal. The State's allegations against Wright do not establish that he is violent or that he is a danger to his community. To the contrary, as described in the attached letters, Wright is known to his community as a loving father, husband, and friend. Wright has already demonstrated that he is not a flight risk, having fully complied with his conditions of bail during the year and a half following his arrest. Wright has every intention of remaining in South Carolina if he is released on bail, while complying with any and all conditions that this Court sees fit to impose. In short, Wright should be granted the same relief typically afforded to any defendant facing a criminal charge who has not been lawfully convicted: release on bail.

Factual and Procedural Background

5. In April 2014, two men—Tarakus Coleman and Lorenzo Jones—robbed Wright's neighbors in their home. Following their arrest, they offered multiple contradictory accounts of the robbery before finally implicating Wright.

Coleman denied involvement at first; he then admitted his role but maintained that he and Jones were the only ones involved; and then, nearly a year after the robbery, he claimed that Wright had helped arrange it. Jones also initially denied involvement in the robbery; he then changed his account to implicate two people other than Coleman and Wright; and finally, after investigators expressly asked him to describe Wright's involvement in the robbery, he contended Wright was the one who orchestrated it.

6. In June 2014, Wright was arrested and released on bail pending trial. He complied with all of his conditions of bail.

7. Wright was indicted in Newberry County on charges of accessory before the fact to two felonies (burglary and robbery) and criminal conspiracy. The case went to trial in January 2016, and was built primarily on the testimony of Coleman and Jones.

8. As the PCR court would later find, the solicitor prosecuting the case made numerous improper comments during the State's closing argument: The solicitor encouraged the jury to convict Wright based on speculation about his supposed future dangerousness—which this Court has long deemed inappropriate during a *guilt* phase of trial. The solicitor told the jury that he was aware of facts outside the record—namely *excluded* allegations of drug activity—that supplied Wright with a motive for arranging the robbery. The solicitor reversed the burden of proof, suggesting that the burden fell to Wright to *disprove* the State's case beyond a reasonable doubt. And the solicitor encouraged the jury to disregard the evidence by expressing his personal opinion as to Wright's guilt—even going so far as to insist

that the *jurors* were “firmly convinced” of those views.

9. Wright’s defense counsel failed to offer any objection during the State’s closing argument. When asked about this decision after trial, she did not claim that it was grounded in trial strategy. She declined to object, she said, out of “courtesy,” and admitted that this “was an error in judgment.”

10. The jury found Wright guilty of accessory before the fact to armed robbery and burglary, but not guilty of criminal conspiracy. He was sentenced to 16 years’ imprisonment and began serving his sentence January 12, 2016.

11. Wright moved for post-conviction relief. On February 26, 2019, a PCR hearing was held before the Honorable Brian M. Gibbons of the Newberry County Court of Common Pleas. The PCR court heard testimony from the two solicitors who tried the case for the State, from Wright, and from his trial counsel (the substance of which is discussed above).

12. On May 14, 2019, Judge Gibbons granted Wright’s PCR application, reversed his convictions, and ordered a new trial, holding that Wright was denied his constitutional right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The court found that the State’s closing arguments were improper in a variety of respects, that defense counsel’s failure to object was not based on any strategy (but merely “common courtesy”), and that—particularly in light of the vulnerabilities in the State’s case—Wright had been unfairly prejudiced. The PCR court concluded that “the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”

13. After the unsuccessfully moving the PCR court to alter or amend the

judgment, the State filed noticed an appeal with this Court on July 23, 2019.

14. Over five months after the notice of appeal, and after receiving three extensions from this Court, the State filed a petition for writ of certiorari on December 4, 2019. The State's petition did not contend that any aspect of the PCR court's decision raises novel, important, or recurring issues. Nor did it claim that there is any split in authority requiring this Court's attention. Instead, the State sought error correction: It simply disagreed with the PCR courts' application of *Strickland*, and attacked the *factual* findings underlying that analysis.

15. Wright served his return to the petition on January 7, 2020. The return argued that the State had not offered any proper basis for certiorari review, and that the PCR court had committed no error in any event.

16. The deadline to submit a reply passed without response from the State.

17. On January 23, 2020, this Court issued a non-dispositional order transferring the State's petition to the Court of Appeals. As of the date of this filing, the Court of Appeals has taken no further action on the State's petition.

18. Almost a year has passed since the PCR court concluded that Wright's trial violated his due process rights, overturned his conviction, and ordered a new trial. Wright remains incarcerated.

Legal Argument

19. "This Court . . . has the inherent power" to "grant bail." *State v. Whitener*, 225 S.C. 244, 248, 81 S.E.2d 784, 786 (1954). "A post-conviction relief applicant may be admitted to bail after the service of the notice of appeal by . . . the State." Rule 243(k), SCACR. "[T]he petition for bail shall be made to the Supreme

Court” where, as here, the applicant’s sentence exceeds 10 years. *Id.*

20. In determining whether to grant bail, this Court considers several factors: “the probability the applicant will prevail on appellate review and the nature of the relief he or she will receive; the seriousness of the criminal offense committed; the danger the applicant may pose to the community if he or she is released; the likelihood that the applicant may flee if released; and the character and circumstances of the applicant.” *Id.* These factors favor bail here.

21. ***Likelihood of success.*** Wright has a strong probability of success on appeal. In vacating his conviction, the PCR court conducted a thorough review of the facts of his case—including a full evidentiary hearing—and concluded that the solicitors made multiple improper comments during closing argument. For example, the State made “[a]rguments relating to [Wright’s] future dangerousness,” which are “inappropriate at the guilt phase of a trial.” *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994). The State did not adhere to this Court’s repeated admonition that “closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.” *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). And the solicitors “breach[ed] their duty to refrain from overzealous conduct by . . . offering unsolicited personal views on the evidence.” *United States v. Young*, 470 U.S. 1, 7 (1985).

22. The PCR court then made a factual finding that defense counsel’s failure to object to those improper comments was not based on any strategy, but rather on “common courtesy,” and that Wright was prejudiced in light of the vulnerabilities in the State’s case. This Court “gives great deference to the factual

findings of the PCR court” and must “uphold them if there is any evidence of probative value to support them.” *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

23. The PCR court’s analysis was correct. But the Court need not reach that issue, because the State does not even argue that this case presents an issue worthy of certiorari. A “writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons,” such as when (1) “there are novel questions of law”; (2) “there is a dissent in the decision of [a] Court of Appeals”; (3) “the decision [below] is in conflict with a prior decision of [this] Court”; (4) “substantial constitutional questions are directly involved”; and (5) “a federal question is included and the decision [below] conflicts with a decision of the United States Supreme Court.” SCACR 242(b).

24. The State does not invoke any of these circumstances. It does not claim that this case presents a novel legal question—nor could it, because it seeks review of a straightforward application of the *Strickland* test. The State does not claim that review is appropriate to address a conflict with this Court’s precedents or those of any Court of Appeals. Although the case involves a constitutional issue, the State does not contend that the issue is “substantial”—it arises out of the unique set of facts presented by this case. Nor does the State claim that the PCR court applied the wrong legal standard, or misunderstood any of the cases it applied. In short, the only reason to grant certiorari would be to correct an error in *this* case alone, to set aside the PCR court’s *factual* findings, and to re-litigate the case-specific arguments that court rejected. There is a strong likelihood that the Court will decline to do so.

25. ***Nature of Relief.*** Wright seeks relief that is reasonable and

proportionate to the circumstances of this case. He seeks the same relief typically available to any individual detained by the State who has not been lawfully convicted: release on bail unless and until the State is able to secure such a conviction.

26. ***Seriousness of offense.*** The seriousness of the charged crime counsels in favor of relief. Even according to the State's story of what transpired on the night of the robbery, Wright himself is not alleged to have engaged in any acts of violence. Rather, the State alleged at trial that Wright merely informed Coleman and Jones that Wright's two neighbors would be at their home with a stash of money and drugs. The State concedes that it was not Wright, but Coleman and Jones, who kicked down the victims' door, who threatened and pointed guns at the victims, and who absconded with small amounts of money, marijuana, and a pair of cell phones.

27. ***Danger to community.*** Wright is not a danger to his community. Prior to this case, Wright had never even been charged with—much less convicted of—a violent felony. (For that matter, in light of the PCR court's decision, he *still* has not been *lawfully* convicted of one.) And just discussed, the violence that the State alleged at trial was carried out entirely by Coleman and Jones. The State acknowledged that Wright was not present at the scene, and the State did not contend that Wright *ordered* Coleman and Jones to engage in any act of violence.

28. ***Flight risk.*** Wright has already demonstrated that he is not a flight risk. Between his arrest in June 2014 and his trial in January 2016, Wright was released on bail for more than a year and a half without incident. During that time, Wright complied fully with the terms of his release, including restrictions on his travel both within and outside the state.

29. Wright has every intention of remaining in South Carolina—the state he has called home for over a decade—and complying with all conditions imposed upon him. His wife Tressa and many of his family members—including his father, mother, stepdaughter, and grandfather—reside in South Carolina. Wright does not have a passport and will refrain from applying for one.

30. *Character and circumstances.* Wright’s character and circumstances counsel in favor of release. Wright has a large and supportive network of friends and family in the community who want to help him rebuild the happy and productive life he enjoyed prior to his arrest.

31. Wright has submitted letters from Stephanie Curry, M.D., and Wanda Davis, both of whom knew Wright for years before his incarceration. Exs. A and B. Dr. Curry’s letter explains that Wright is a “loving father” who “dote[s] on his daughter when she visits”; that “[h]e is married to a wonderful woman” with a daughter whom Wright “helped to raise . . . as his own”; that Wright frequently visited his grandmother when she became ill; that Wright “has a large extended family who love and believe in him”; and that Wright “is a good man worthy of a chance of full redemption.” Ex. A. Dr. Curry is “confident that [Wright] can and will become a productive citizen that his wife, children, family and community-at-large can be proud of.” *Id.*

32. Ms. Davis’s letter explains that Wright has “many fine qualities,” and a “great family man” who “will help anyone [] he can without being asked,” including by “helping buy food to be cooked and to be served to the community for free.” Ex. B. Wright “operates with integrity, and never has a bad word to say about anyone.” *Id.*

Ms. Davis “ha[s] no doubts about his abilities to succeed in the future.” *Id.*

33. If granted release, Wright will have the support and resources he needs to successfully reintegrate into his community as he awaits final disposition of the State’s appeal.

34. Should this Court grant bail pending resolution of the State’s appeal, Wright would live with his wife, Tressa Wright, at their home in Irmo, South Carolina.

35. Wright is willing to submit to any and all conditions of bail this Court deems proper. These include home detention with GPS monitoring, seeking Court approval prior to any change of address, refraining from applying for a passport, and whatever other conditions this Court chooses to impose as a condition of release.

WHEREFORE, Respondent respectfully requests that this Court grant this petition for bail pending appellate review, subject to any conditions that this Court deems appropriate.

On this the 11th day of May, 2020.

BY: /s/ Michael Rayfield

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