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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post-Conviction Relief

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2020-001398

Carnail Graham, ... Petitioner,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Trial counsel failed to provide effective assistance when he did not elicit the testimony of Conswella Smith in support of Petitioner's defense.

II. Trial counsel failed to provide effective assistance when he did not object to vouching by the solicitor during closing arguments.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted during the July 2012 term of the Horry County Grand Jury for murder (2012-GS-26-3077). Petitioner proceeded to a jury trial on October 13, 2014 that was presided over by the Honorable Steven H. John. David J. Canty, Esquire represented Petitioner and Nancy Livesay, Esquire of the Fifteenth Circuit Solicitor's Office prosecuted the case. The jury found Petitioner guilty as indicted and Judge John sentenced him to a term of thirty-two years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Lara M. Caudy, Esquire who raised the following issue:

> Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

By unpublished opinion released October 19, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Graham, Op. No. 2016-UP-437 (S.C. Ct. App. filed Oct. 19, 2016). The Remittitur issued November 8, 2016.

Petitioner filed an application for post-conviction relief on August 11, 2017 by and through Tommy A. Thomas, Esquire, in which he alleged ineffective assistance of counsel. A return and motion for more definite statement was filed November 20, 2017 by the State. An evidentiary hearing on Petitioner's application was convened on November 26, 2018 at the Horry County Government and Justice Center in Conway, South Carolina before the Honorable Kristi F. Curtis. Petitioner was represented by Tommy A. Thomas, Esquire. Johnny E. James, Jr., Esquire

represented the Respondent. Petitioner was allowed to submit an amended list of issues after the hearing and did so on December 3, 2018. These were as follows:

1. "Counsel was ineffective in not properly preparing the case for trial."
2. "That Counsel weas ineffective in not properly presenting Pre-Trial Motions to:"
    a. "Hire a ballistics' expert. That counsel failed to anticipate that a ballistic expert would be necessary."
    b. "Failure to locate and [subpoena] witnesses for trial."
3. "For ineffective cross-examination of the State's Star Witness, Keir Johnson."
4. "For failure to properly present at Trial the testimony of Conswella Smith. Ms. Smith was an eyewitness to the two alleged perpetrators of the crime returning from the mobile home to the van. That her testimony would have been that the Applicant was not one of the individuals that she saw returning to the van."
5. "That counsel was ineffective for not properly using cell phone data and in examining the cell phone expert to show that the Applicant was not present at the scene."
6. "That Counsel was ineffective for not objecting to the Solicitor's closing argument in which she improperly bolstered the statements of Keir Johnson. She also appealed to the emotional interest of the jury rather than the factual evidence that was before the Court."
7. "That counsel was ineffective for not adequately explaining to Applicant his right to take the stand and testify."

An order of dismissal was signed by Judge Curtis on June 1, 2020. Petitioner received written notice of entry of the order on September 22, 2020 and filed a notice of appeal on October 20, 2020. This petition for writ of certiorari follows.

STATEMENT OF FACTS

Facts adduced at trial

During the early morning hours of November 8, 2011, two men forcibly entered the mobile home shared by Keia Pertelle, her boyfriend Rodney ("Splurge") McElveen, and her cousin Carlton Dontrell Watts. McElveen was a well-known cocaine dealer, and it was believed the intruders were searching for drugs and money. During the burglary and attempted armed robbery, Pertelle was shot and killed. It was disputed during trial whether one of the armed intruders shot Pertelle or whether the fatal shot was inflicted by McElveen, who discharged his .357 Magnum revolver five times during the encounter. After entering the home and conducting a "protective sweep," the officers found Pertelle lying on top of the bed located in the bedroom she shared with McElveen. She was deceased and had blood on her left chest region. App. p. 144, line 6 – p.146, line 15.

Prior to the altercation, neighbors in the mobile home park saw an unfamiliar brown van driving around the neighborhood in a suspicious manner. The van was parked in front of the home of Conswella Smith for a period. After the neighbors heard gunshots, they saw two people leave the mobile home, enter the van, and flee the neighborhood. App. p.117, lines 17 - 120, line 17; App. p. 125, lines 7-23. The van was later recovered, and numerous latent fingerprints were lifted, including those of Thomas Booker James, Keir Lamont Johnson, Letitia Tasha Freshley, and Markel Hasheem Rush. App. p. 223, line 11 – p. 224, line 15. Petitioner's fingerprints were not found anywhere on the van. App. p. 236, lines 2-6.

Keir Lamont Johnson (a/k/a "Bootsie" (App. p.481, lines 1-2)) was arrested for driving without permission with intention to deprive because the van belonged to his girlfriend; however, he was later arrested for the murder. Over time, he provided six statements to police while he continued to deny any involvement. One of these statements, provided on April 24, 2012,

implicated Petitioner and Thomas Booker James in the burglary and murder. App. p. 561, l. 12 - 562, l. 6. The assistant solicitor subsequently consented to a low bond being set for Johnson on the murder charge and, as a result, Johnson was released from jail shortly after giving this new statement. App. 613, line 13 – p. 614, line 7.[1]

Ultimately, Petitioner and Mr. James went to a joint trial. The trial was continued once due to late receipt of firearms evidence. PCR Tr. p.57, lines 3-8; p.58, line 21 – p.59, line 15. On the eve of the second trial date, additional firearms evidence was also received, but a second continuance was not granted, despite a motion being made. Also denied was a motion to sever the cases for trial. PCR Tr. p.29, lines 11-19. David J. Canty, Esquire represented Petitioner at trial, while Bobby Frederick, Esquire represented Mr. James. Petitioner was found guilty by a jury and sentenced to 32 years imprisonment.

Facts adduced at the post-conviction relief hearing

Petitioner testified first, reporting a generally good relationship with Mr. Canty ("trial counsel") that included seven or eight visits at the jail and phone calls in order to prepare for trial. PCR Tr. p.12, lines 17 – 25. Petitioner reported that he was very active in his defense, always trying to provide trial counsel information and assistance while maintaining his innocence. Part of this included asking trial counsel to get surveillance video of him buying baby necessities at a Walgreen's to bolster his alibi. PCR Tr. p. 14, lines 1-24. He confirmed that trial counsel hired a private investigator and seemed to believe in his innocence. PCR Tr. p.16, lines 3-6; lines 7-13; 15-17. Petitioner spoke of the evidence in his favor – the shoeprint on the door of the crime scene

[1] As implied in the brief of appellant in the direct appeal and testified to during the hearing on the application for post-conviction relief, most involved in this case find Mr. Johnson to be less than credible.

was four sizes smaller than his, the gun he was seen with was not a match to the bullet in the victim, his fingerprints were not found anywhere, his DNA was not found anywhere.

However, Petitioner felt that trial counsel did not bring enough attention to the fact that there was a lack of evidence tying him to the crime scene. PCR. Tr. p.28, line 14 – p.25, line 2. Petitioner focused on the fact that trial counsel interviewed and subpoenaed Conswella Smith, a neighbor of the deceased, who witnessed the altercation and the perpetrators, but was not actually called to testify. He testified that he believed her testimony and close proximity to the action would have been crucial to his presentation of evidence. PCR. Tr. p.31, lines 2-6. Petitioner testified at length about the untruths he believed Mr. Johnson told, including his multiple statements to law enforcement. He also opined as to what he believed were further evidentiary strengths in the cell phone data, namely that it placed his phone away from the others involved in the crime. Lastly, Petitioner testified that he believed the solicitor vouched for the State's star witness, Mr. Johnson, and his truthfulness during its closing argument. PCR Tr. p.42, line 25 – p.43, line 10.

Next, Petitioner called Ms. Conswella Smith who testified to the facts as she recalled them, including that she saw the van and was talking to the men inside of it, who went by the nicknames Little Bootsie and Q (in the transcript as "Que."). She testified that law enforcement had been called before shots were fired because the van and its occupants were scaring the neighborhood. She saw two short men running from the home after the shots were fired – they were not Bootsie (Mr. Johnson), Q, or Dubba (Petitioner). PCR Tr. p.51, 1-20.

The last witness was trial counsel, David Canty, Esquire. He confirmed Petitioner's testimony completely, adding that his strategic decisions not to add more evidence or testimony was because the State had failed to meet its burden. PCR Tr. p.60, lines 22-25. He added, though, that not calling Ms. Smith as a witness bothers him "more than anything else about this case" and

"now, obviously, I would put her on the stand." PCR Tr. p.60, lines 13-14; p.75, lines 20-21. His reasons for not calling her, other than the failure of the State's case, included that it was late in the day and Ms. Smith had prior convictions, including those for moral turpitude. PCR Tr. p.60, lines 14-22. However, at the hearing, trial counsel testified that he believed her testimony would have ultimately been helpful as it showed there were four perpetrators rather than three. PCR Tr. p.61, lines 1-12. Regarding the other major issue of vouching by the State, trial counsel testified that he did not object because he likes to give deference to opposing counsel. PCR Tr. p.72, lines 6-12 (believed error – "differential" should be "deferential") Further, he explained the statements as "farcical," since no one would believe they were offered for the truth.

ARGUMENT

I. Trial counsel failed to provide effective assistance when he did not elicit the testimony of Conswella Smith in support of Petitioner's defense.

II. Trial counsel failed to provide effective assistance when he did not object to vouching by the solicitor during closing arguments.

Standard of Review and Applicable Law

For post-conviction relief cases

In post-conviction relief actions, 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 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2051 (1984); Butler, 286 S.C. at 442. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The court presumes the counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Counsel's assistance is considered constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 687-88.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Franklin v. Catoe, 346 S.C. 563, 570, 552, S.E.2d 718, 722 (2001). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry,

300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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, 286 S.E.2d at 625.

For post-conviction relief appeals

The standard of review in post-conviction relief cases is entirely dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). During review of factual findings made by the post-conviction relief court, the appellate court will defer to the findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Alternately, when reviewing a question of law, an appellate court will consider the matter *de novo* and is not required to defer to the post-conviction relief court's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

I. Trial counsel failed to provide effective assistance when he did not elicit the testimony of Conswella Smith in support of Petitioner's defense.

Petitioner asserts his trial attorney was ineffective for, *inter alia*, failing to call Conswella Smith as a witness, especially despite interviewing and subpoenaing her for testimony. It is clear from trial counsel's testimony that whatever strategic decisions he may have relied on at the time of trial are no longer valid. Trial counsel testified at the post-conviction relief hearing that his main reason for not calling Ms. Smith was what he believed to be the State's failure to meet is burden of proof. Petitioner's conviction is evidence that the jury disagreed with trial counsel's evaluation of the evidence. Therefore, it is clear that trial counsel's strategic decision actually resulted in a prejudicial result to his client.

Trial counsel made a strategic decision not to call Ms. Smith despite the effort he put into vetting her story and testimony. He carefully weighed the costs and benefits of her potential testimony. While the choice may have been questionable, it is not questionable for the reasons laid out in the order of dismissal issued in this matter. The post-conviction relief court cites Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) for the proposition that "where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward."

Petitioner strongly disagrees with this description of Ms. Smith's testimony. What was elicited by Ms. Smith's testimony, and characterized by trial counsel's subsequent testimony, is that there were four perpetrators, not three, and that Petitioner and Mr. James could be excluded from that number. Ms. Smith would have testified at trial that while she spoke to Bootsie and Q in the van, two more men ran from inside. The more potential suspects that can be created the more helpful for Petitioner. Therefore, Edwards is inapplicable here because Ms. Smith's testimony would have provided new information at trial, including in trial counsel's estimation.

Regardless of trial counsel's concession that he should have called Ms. Smith to the stand based on the ultimate conviction of Petitioner, the facts support this conclusion. The order of dismissal lists evidence and testimony presented at trial that Ms. Smith's testimony could have refuted. These refutations would have been particularly helpful given the assertions that Mr. Johnson lied before and during the trial. Because trial counsel failed to call Ms. Smith, he failed to present a version of facts more favorable to his client and attempt to paint a correct picture. Though post-conviction relief cases always discuss the idea that one cannot dwell on the fact that hindsight is 20/20, it is apparent that trial counsel waited until the last moment to decide whether to call Ms. Smith. Instead of allowing her to add that there were four total perpetrators and two

short men left the scene – none of which could include Petitioner – trial counsel did not call Ms. Smith.

This is clearly a demonstration of ineffective assistance of counsel on the part of Mr. Canty. Had he called Ms. Smith, "[t]he likelihood of a different result [is] substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011) (quoting Strickland v. Washington, 466 U.S. 668 (1984)), thus causing demonstrable prejudice to Petitioner. For these reasons, Petitioner's petition for certiorari must be granted.

II. Trial counsel failed to provide effective assistance when he did not object to vouching by the solicitor during closing arguments.

Petitioner asserts his trial attorney was ineffective for, *inter alia*, failing to object to improper comments made by the solicitor during her closing arguments that could be construed as vouching for the integrity of the state's witnesses. During the post-conviction relief hearing, several passages of the State's closing argument were cited. The most egregious portions of these are as follows:

> They want to tell you that Bootsie wants to tell a lie. Bootsie could have told any two names. If he wanted to tell you Little Manzy, he could. If he wanted to tell you 110, he could. These boys are his friends. He could have told you two people that he had no relationship to, or two people that he didn't like, or two people anything. He could have told you anybody, but he didn't. He told you these two people.
>
> *He has no reason to lie on these people. They are all friends, and they have been friends a long time. He's here telling on these people because it's the truth.*
>
> (Tr. 1019, lines 8-19) (emphasis added).

They want to tell you everybody in here has got a reason to lie, everybody. If these people had a reason to lie, they could have blamed it on anybody. But they didn't. Ironically, they blamed it on the same guy that Howard Parker saw out that night. Ironically, they blamed it on that same guy that's out at the jail bragging that we ain't got nothing on him and that he shot that girl. *Bootsie had no reason to lie.*

They want to tell you that he's scared of a Crip, there are Crips in the car. This guy is a Crip. If he was going to blame it on somebody, it wouldn't be somebody in the Crip that is a close friend of his. He came up here and told you the truth.
(Tr. 1021, lines 6-25) (emphasis added).

Though trial counsel thought the above statements were within the bounds of deference or farce, Petitioner disagrees and argues that trial counsel was ineffective when he did not object to them during closing argument at trial. "A solicitor[] cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity. . . ." Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (citing State v. Shuler, 344 S.C. 604, 545, S.E.2d 805 (2001)).

Clearly, the solicitor is stating to the jury that her star witness, who provided multiple contradictory statements and whose credibility was in question through the trial, is truthful and has no reason to lie. "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's credibility." State v.

Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001), rev'd on other grounds, 534 U.S. 246, 122 S. Ct. 726 (2002). Additionally, solicitors must not "appeal to the personal biases of the jury" or "arouse the jurors' passions or prejudices." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Surely this was violated when the solicitor began speaking of why someone as tough as her witness should be scared of gang members and may be tempted to act in a way that does not offend them.

These remarks are highly offense and prejudicial. For trial counsel not to have objected is, frankly, astonishing. The power of the office of the solicitor placed behind the questionable remarks of the state very likely turned the questionable testimony of its star witness into something the jury could put its votes behind. The burdens of Cherry and Strickland are clearly met and, as such, Petitioner's petition for certiorari be granted.

CONCLUSION

For the above-stated reasons, Petitioner's petition for certiorari should be granted.

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