

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable Paul M. Burch, Circuit Court Judge

TYRONE DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000854

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

Defense counsel provided ineffective assistance of counsel when he failed to preserve for appellate review the issue of the state's improper bolstering of its confidential informant, where the state elicited testimony that defense counsel had used the same confidential informant during defense counsel's previous time as a solicitor 4

Relevant Facts 4

Discussion 6

CONCLUSION 13

ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed to preserve for appellate review the issue of the state's improper bolstering of its confidential informant, where the state elicited testimony that defense counsel had used the same confidential informant during defense counsel's previous time as a solicitor?

STATEMENT

During the November 2008 term, the Marion County Grand Jury indicted Petitioner for distribution of cocaine base, third offense and distribution of cocaine base within proximity of a school or park. App. 254 – 255.

Petitioner was tried in his absence on November 12-13, 2009 in front of the Honorable William H. Seals, Jr., and a jury. App. 1. Jack Lawson represented Petitioner. Id. John Jepertinger and Steven Deberry represented the state. Id.

Petitioner was found guilty as indicted. App. 169, ll. 9 – 20. A sealed sentence was imposed and subsequently published on February 22, 2010, by Judge Seals. App. 178. Petitioner was sentenced to imprisonment for an aggregate period of twenty years. Id.

Petitioner appealed his conviction. App. 174 – 182. On May 9, 2012, in an unpublished opinion, the Court of Appeals affirmed Petitioner's convictions. App. 185 – 186; State v. Davis, No. 2012-UP-289 (2012).

Petitioner filed an application for post-conviction relief (PCR) on August 14, 2012. App. 187 – 194. The state filed its Return on April 24, 2014. App. 195 – 200.

Petitioner's PCR hearing was held on March 16, 2017 in front of the Honorable Paul M. Burch. App. 202. Tristan M. Shaffer represented Petitioner. Id. Lindsay McCallister represented the state. Id. During the evidentiary hearing, Petitioner made an oral amendment to his PCR application that trial counsel was ineffective for failure to preserve the bolstering issue in his case, where the state elicited testimony that defense counsel Lawson used this same confidential informant in an earlier case where defense counsel was the solicitor. App. 206, l. 3 – 207, l. 4.

Judge Burch filed an Order of Dismissal on March 15, 2018. App. 239 – 253. The PCR court denied Petitioner's allegation that defense counsel provided ineffective assistance of

counsel when he rejected the trial court's proposed curative instruction and thus failed to preserve the bolstering issue for appellate review. App. 246 – 247 .The PCR Court found that trial counsel articulated a valid trial strategy for rejecting the curative instruction because they, “tend to bring into focus precisely the item the objector has kept out.” Id.

This petition for a writ of certiorari follows.

ARGUMENT

Defense counsel provided ineffective assistance of counsel when he failed to preserve for appellate review the issue of the state's improper bolstering of its confidential informant, where the state elicited testimony that defense counsel had used the same confidential informant during defense counsel's previous time as a solicitor.

Relevant Facts

The state alleged the facts as follows. Police officers met with confidential informant Carmichael on March 14, 2008 at "Thomas Supply". App. 45, ll. 7 – 22. Carmichael, a female informant, was searched by two male police officers. App. 45, l. 23 – 46, l. 2. The officers then put audio and video recording devices on her. App. 49, l. 12 – 50, l. 10. They also gave her forty dollars for the controlled drug buy, allegedly arranged with Petitioner. App. 48, ll. 16 – 19.

Petitioner was arrested on April 8, 2008. App. 49, ll. 3 – 11. At trial on November 12-13, 2009, Petitioner was not present. App. 20, l. 17 – 21, l. 14. An officer of the court, James Bennett, called Petitioner's name outside of the court room and received no response. App. 23, l. 13 – 24, l. 6. The court decided that the trial can go forward in Petitioner's absence. App. 24, ll. 9 – 15. Petitioner was found guilty as indicted. App. 169, ll. 9 – 20.

Carmichael testified that she called Petitioner and asked to buy drugs from him. App. 103, ll. 7 – 10. She testified that she knew Petitioner from before the day of the controlled drug buy. App. 102, l. 22 – 103, l. 1.

Carmichael stated the police officers dropped her off nearby the rendezvous location and she walked the rest of the way to meet Petitioner. App. 104, ll. 20 – 25. A car pulled up next to her. App. 105, ll. 4 - 12. Petitioner was the passenger seat in the car and the driver was an unidentified female. Id.

Carmichael testified that she asked Petitioner for drugs and gave him forty dollars. App. 105, ll. 13 – 19. Petitioner asked for her cigarette box, put drugs in it, gave it back to her, and drove off. App. 106, ll. 2 – 7. Carmichael admitted that other individuals approached her as she went to and from the controlled buy. App. 106, l. 13 – 108, l. 3. She alleged that none of those other people gave her drugs or a cigarette box with drugs in it. *Id.* One of the individuals who approached her was a Willie Crawford, who Carmichael had purchased drugs from in the past. App. 116, ll. 11 – 16.

In an attempt to vouch for the credibility of Carmichael, the solicitor wrongfully elicited testimony from Lieutenant Bryan Wallace that the confidential informant was used as a CI in a prior case in which Petitioner’s defense counsel, Jack Lawson, was the solicitor¹. App. 95, ll. 2 – 4.

Trial counsel waited until after Wallace’s testimony was concluded to object and move for a mistrial because he, “was shocked and taken aback,” by the line of questioning by the state. App. 96, l. 19 – 97, l. 5. The court denied trial counsel’s motion for a mistrial but offered to give the jury a curative instruction. App. 97, ll. 19 – 21. Defense counsel’s rejection of the curative, without subsequent objection to it or to the denial of the mistrial waived the bolstering issue for appellate review.² App. 98, ll. 23 – 24.

¹ Throughout Petitioner’s trial, the state vouched for confidential informant Carmichael’s credibility. In its opening statement, the state claimed, “we have a good person, in the form of the confidential informant.” App. 28, ll. 18 – 20. During the state’s case in chief the solicitor elicited testimony from police officers regarding the confidential informant’s history of work with police. App. 44, l. 13 – 47, l. 10; App. 88, l. 16 – 89, l. 11.

² The Court of Appeals held that defense counsel failed to preserve the bolstering issue when he rejected the curative instruction without subsequently objecting to it as inadequate to cure the prejudice and without objecting to the denial of his mistrial motion. *State v. Davis*, Op. No. 2012-UP-289 (May 9, 2012) citing *State v. Watts*, 321 S.C. 158, 164-65, 467 S.E.2d 272, 276 (Ct. App. 1996). Defense counsel could have preserved the issue if he accepted the curative instruction and subsequently took exception to it as inadequate to cure the prejudice.

In the state's closing, the solicitor boiled the case down to the credibility of the confidential informant that the solicitor improperly vouched for by putting before the jury the fact that defense counsel Lawson had used the same confidential informant in the past as a solicitor. App. 138, ll. 20 – 21. He furthered that, “uncategorically, without people like Rosa Carmichael, law enforcement couldn't function.” App. 139, ll. 3 – 4. After going over the admittedly shaky video and audio evidence again, the solicitor told the jury, “you know why *she's believable because she's telling you the truth.*” App. 29, ll. 1 – 9; App. 141, ll. 16 – 17. (emphasis added) The very last sentence the solicitor told the jury was, “Please don't forget the veracity and truthfulness of Rosa Carmichael.” App. 144, ll. 20 – 23.

Discussion

Defense counsel provided ineffective assistance of counsel where he failed to preserve for appellate review the issue of the solicitor's improper bolstering of the state's key witness, Carmichael. State v. Davis, No. 2012-UP-289 (2012); State v. Watts, 321 S.C. 158, 164-65, 467 S.E.2d 272, 276 (Ct. App. 1996). That error prejudiced Petitioner because had defense counsel properly preserved the bolstering issue for appellate review there is a substantial likelihood that his appeal would have had a different result. Moreover, the strategy defense counsel explained for refusing the curative instruction ran counter to South Carolina jurisprudence that states, “a curative instruction to disregard testimony is deemed to have cured any alleged error.” State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009).

The solicitor's improper bolstering of Carmichael's credibility so infected Petitioner's trial with unfairness the resulting conviction was a denial of due process. App. 95, ll. 2 – 4; See Vaughn v. State, 362 S.C. 163, 170, 607 S.E.2d 72, 75-76 (2004) (finding “[w]hile the petitioner's argument may have invited some response, the solicitor's response [which improperly vouched

for the State's witness] was unfair and prejudiced the petitioner, in light of the lack of evidence of his guilt on the PWID charge"). Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 239 – 253; See Strickland v. Washington, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims).

This Court has defined when a solicitor improperly vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), rev'd on other grounds, Kelly v. State, 534 U.S. 246, (2002):

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that *evidence is not presented to the jury but known to the prosecutor*, supports the charges against the defendant and *can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury*; and (2) *the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.*

Id. at 368-69, 540 S.E.2d at 860 (quotation omitted) (emphasis added).

Moreover, in State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) this Court held that "[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, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]" Shuler, at 630, 545 S.E.2d at 818 (citations omitted). Accordingly, "[b]ecause 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." Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting

Kelly, 343 S.C. at 369, 540 S.E.2d at 861).

Although, at PCR, Petitioner's allegation of ineffective assistance focused on the questioning during Lieutenant Bryan Wallace's redirect examination, the record shows multiple instances where the solicitor impermissibly vouched for Carmichael's credibility and in doing so violated both principles set forth in Shuler.

The solicitor directly expressed his personal opinion concerning Carmichael's credibility on multiple occasions, throughout every stage of the trial. In its opening, the state referred to Carmichael as, "[a] good person in the form of the confidential informant." App. 28, ll. 18 – 20. During redirect examination of Bryan Wallace, the state elicited testimony that when Carmichael testified for the state in the past, defense counsel was the solicitor who utilized her. App. 95, ll. 2 – 4. During closing the solicitor emphasized the importance of Carmichael's testimony and then made multiple improper vouching comments about her credibility. App. 138, ll. 20 – 21; App. 141, ll. 16 – 17; App. 144, ll. 20 – 23.

This constant emphasis that Carmichael's credibility was impeccable further exacerbated the need for defense counsel to preserve for appellate review the wrongful bolstering of Carmichael's credibility during Lieutenant Bryan Wallace redirect testimony. The knowledge that defense counsel had used Carmichael in the past, when defense counsel used to be a solicitor, undoubtedly posed a significant risk that the jury would improperly cloak Carmichael with credibility from evidence outside of Petitioner's trial. App. 95, ll. 2 – 4; See Shuler, supra.

Defense counsel objected and moved for a mistrial after the solicitor improperly questioned Wallace about defense counsel's use of Carmichael as a CI when defense counsel was the solicitor in a prior case. App. 96, l. 19 – 97, l. 5. The trial court denied trial counsel's motion for a mistrial and offered to give a curative instruction. App. 97, ll. 19 – 21. Defense

counsel rejected the curative instruction. App. 98, ll. 18 – 24. However, defense counsel failed to object to either the curative instruction as ineffectual due to the prejudice already inflicted by the solicitor’s improper vouching, or to the denial of the mistrial motion. Therefore, defense counsel failed to preserve the issue the solicitor’s bolstering issue for appellate review. State v. Watts, 321 S.C. 158, 164-65, 467 S.E.2d 272, 276 (Ct. App. 1996) (holding appellant waived any complaint he had to the challenged testimony in rejecting the trial court’s offer to give a curative instruction).

During Petitioner’s trial, trial counsel explained that his “strategy” for rejecting the court’s offer of a curative instruction was because he thought that a curative instruction might cause more problems than it would cure. App. 98, ll. 18 – 24. However, PCR counsel properly identified that trial counsel’s “strategy” was not a viable trial strategy at all because it was contrary to South Carolina jurisprudence. App. 233, l. 24 – 234, l. 22.

At Petitioner’s PCR hearing, appellate counsel, Wanda Carter, affirmed that had defense counsel done more than simply reject the curative instruction, the issue would have been preserved for review. App. 230, l. 14 – 231, l. 4. Moreover, she asserted that had the Court of Appeals denied Petitioner’s appeal on the merits rather than finding the bolstering issue unpreserved, she would have appealed that decision to this Court. App. 231, l. 19 – 232, l. 4.

PCR counsel astutely argued, “there is no objectively reasonable trial strategy for waiving that issue.” App. 234, ll. 13 – 16. He continued that if the PCR court agreed with defense counsel’s reasoning for rejecting the curative instruction, the court would be agreeing to a proposition that is, “opposite to the case law that... says that the curative instruction is binding on the jury.” App. 234, ll. 22 – 25. See State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) (see also: State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007), aff’d

as modified 383 S.C. 66, 678 S.E.2d 405 (2009); State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989)).

Therefore, defense counsel's failure to preserve the improper bolstering issue for appellate review constituted deficient performance as it fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-88. There was no viable trial strategy to failing to preserve the issue for review. App. 233, l. 24 – 236, l. 8. Defense counsel should have either objected to the curative instruction because it was inadequate to cure of the prejudice already inflicted by the solicitor's vouching. In the alternative, defense counsel should have objected to the trial court's denial of the motion for a mistrial when the solicitor's improper questioning with Lieutenant Wallace, "implicitly vouch[e]d for a witness' veracity by indicating information not presented to the jury supports the testimony..." App. 95, ll. 2 – 4; Shuler, at 630, 545 S.E.2d at 818.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Then Petitioner must show trial counsel's ineffective assistance prejudiced Petitioner case because, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is alleged, 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, 466 U.S. at 692.

Defense counsel's deficient performance prejudiced Petitioner because his failure to preserve for review the solicitor's improper vouching of the Carmichael's credibility "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as

having produced a just result.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692); *Cf.* Edmond v. State, 341 S.C. at 348, 534 S.E.2d at 686.

The improper bolstering of Carmichael’s credibility also carried with it the state’s imprimatur of credibility as the solicitor improperly interwove his credibility with that of the CI’s credibility. Kelly, at 368-69, 540 S.E.2d at 860; App. 28, ll. 18 – 20; App. 138, ll. 20 – 21; App. 141, ll. 16 – 17; App. 144, ll. 20 – 23. Before and after the improper questioning during Wallace’s redirect testimony, the solicitor made overt comments regarding his opinion as to the credibility of Carmichael. Id.

The solicitor’s improper vouching of the CI’s credibility usurped the traditional role of the jury, who is *solely* authorized to gauge the credibility of witnesses in a jury trial. See Gilchrist, 350 S.C. at 227, 565 S.E.2d at 285 (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861); see also Shuler, 344 S.C. at 630, 545 S.E.2d at 818. (emphasis added) Carmichael’s credibility was “crucial to the government’s case” because she was the state’s key witness. Gilchrist, 350 S.C. at 228, 565 S.E.2d at 285; See Matthews v. State, 350 S.C. 272, 565 S.E.2d 766.

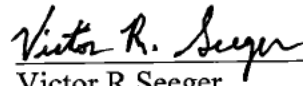
Carmichael was the only witness that alleged Petitioner distributed crack cocaine. Thus, her credibility was paramount in this case because she supplied the testimony that supported the conviction. App. 99, l. 23 – 116, l. 21. The solicitor repeatedly emphasized the importance of Carmichael’s credibility throughout the trial. App. 28, ll. 18 – 20; App. 138, ll. 20 – 21; App. 141, ll. 16 – 17; App. 144, ll. 20 – 23. The last words the solicitor told the jury in his closing were, “Please don’t forget the veracity and truthfulness of Rosa Carmichael.” App. 144, ll. 20 – 23; See Gilchrist, 350 S.C. at 228, 565 S.E.2d at 285.

Therefore, the PCR court erred in finding defense counsel provided effective assistance of counsel because there is a reasonable probability that, but for defense counsel’s failure to

preserve the improper bolstering issue for review, the result of Petitioner's appeal would have been different. App. 239 – 253; Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this court remand his case to the circuit court for a new trial, or in the alternative, grant certiorari to allow for a full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable Paul M. Burch, Circuit Court Judge

TYRONE DAVIS,

PETITIONER

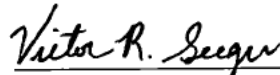
V.

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 Samuel Key, 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 Tyrone Deshawn Davis, #232416, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 7th day of January, 2019.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 7th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028