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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

BRIEF OF PETITIONER

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Trial counsel erred in failing to object to the solicitor’s closing comments that improperly bolstered the testimony of the state’s witness¹ who asserted that he was robbed and assaulted by petitioner as this witness and petitioner were the only eyewitnesses to the event in question, and where petitioner did not testify at trial, and where there was a hung jury (insufficient evidence of guilt) prior to the Allen² charge that was given, because this witness’ credibility was critical at trial, particularly since this witness claimed initially that he knew not who committed the crimes against him, but subsequently regained his memory via an epiphany and stated that petitioner was the perpetrator.....4

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¹ Demetrius Holloman.

² Allen v. United States, 164 U.S. 492 (1896). See App. p.298, 1.20-p.300, 1.16.

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ISSUE PRESENTED

Trial counsel erred in failing to object to the solicitor's closing comments that improperly bolstered the testimony of the state's witness³ who asserted that he was robbed and assaulted by petitioner as this witness and petitioner were the only eyewitnesses to the event in question, and where petitioner did not testify at trial, and where there was a hung jury (insufficient evidence of guilt) prior to the Allen⁴ charge that was given, because this witness' credibility was critical at trial, particularly since this witness claimed initially that he knew not who committed the crimes against him, but subsequently regained his memory via an epiphany and stated that petitioner was the perpetrator.

³ Demetrius Holloman.

⁴ Allen v. United States, 164 U.S. 492 (1896). See App. p.298, 1.20-p.300, 1.16.

STATEMENT OF THE CASE

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 alleging ineffective assistance of trial counsel. 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 PCR case. App. 464-480. Petitioner appealed and filed a petition for writ of certiorari on September 3, 2019. The respondent's return was filed on January 7, 2020. On September 28, 2021, this Court granted petitioner's petition on question three (3) of the petition concerning improper bolstering. This Brief of Petitioner follows.

STANDARD OF REVIEW

PCR applicants have the burden of proving their allegations by a preponderance of the evidence. Tappeiner v. State, 416 S.C. 239, 248, 785 S.E.2d 471, 476 (2016). “[T]his [c]ourt will uphold the PCR court’s factual findings if there is any evidence of probative value in the record to support them.” Thompson v. State, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), *reh’g denied*, (June 12, 2018). This court reviews questions of law de novo and will reverse if the PCR court’s decision is controlled by an error of law. Small v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018), *reh’g denied*, (March 29, 2018).

ARGUMENT

Trial counsel erred in failing to object to the solicitor's closing comments that improperly bolstered the testimony of the state's witness⁵ who asserted that he was robbed and assaulted by petitioner as this witness and petitioner were the only eyewitnesses to the event in question, and where petitioner did not testify at trial, and where there was a hung jury (insufficient evidence of guilt) prior to the Allen⁶ charge that was given, because this witness' credibility was critical at trial, particularly since this witness claimed initially that he knew not who committed the crimes against him, but subsequently regained his memory via an epiphany and stated that petitioner was the perpetrator.

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

⁵ Demetrius Holloman.

⁶ Allen v. United States, 164 U.S. 492 (1896). See App. p.298, 1.20-p.300, 1.16.

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, 1.1-2; App. 127, 1.18-p.139, 1.23.

Debra Singleton, who was Holloman's mother, testified that Holloman told her that petitioner hit him in the mouth with a gun.⁷ App. 170, lines 10-21.

During the PCR hearing, petitioner claimed trial counsel erred in not objecting to the solicitor's improper vouching for Demetrius Holloman at closing by stating that he believed Holloman told the truth. Trial counsel claimed that said comments made by the solicitor were not

⁷ 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.

objectionable. 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. State v. Taylor, 404 S.C. 506, 745 S.E.2d 124 (2013); 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). See also, State v. Geter, 2021 WL 3641733 (2021), where the issue of improper bolstering was addressed and where the Court cited to Chappelle v. State, 429 S.C. 68, 837 S.E.2d 496 (2019) in noting the following testing points to use for analyzing and identifying improper bolstering:

- 1.) If the witness directly states an opinion about the other witness' credibility; or
- 2.) If the sole purpose of the testimony is to convey the witness' opinion about the other witness' credibility; or
- 3.) If there is no way to interpret the testimony other than to mean the witness believes the other witness is telling the truth.

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, i.e. telling the truth. In Geter, the investigator's testimony claiming that the testimony of the bouncer from the restaurant/bar regarding the defendant's assault on him and the victim had been consistent with his (bouncer's) statement given previously was found by the Court to be improper bolstering because it conveyed the truthfulness and accuracy of the bouncer's testimony at trial. Compare State v. Washington, 431 S.C. 619, 848 S.E.2d 794 (2020), where the Court held that improper bolstering occurred in a burglary case where the officer repeatedly asked the defendant how his fingerprints ended up in the home that was burglarized when alibi was the defense in the case and there was no other evidence presented by the state other than the fingerprint evidence. Also, compare State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), where the Court found improper bolstering where the cellmate of the accused stated that the accused

confessed to murder and where the cellmate answered in the affirmative when the solicitor asked him if he held to his bargain of telling the truth in his testimony.

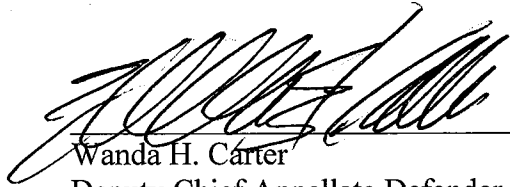
In this case, the solicitor repeatedly (five (5) times) told the jury at closing that he vouched for Holloman's veracity as a witness to the extent that witness Holloman was telling the truth and that he thought, and even knew, that witness Holloman was telling the truth. This was the solicitor's personal assurance to the jury about the truthfulness of Holloman's testimony. The solicitor's vouching for the truthfulness of Holloman's testimony that pointed to petitioner as the perpetrator was error because it violated the rule prohibiting bolstering. Note that Holloman failed to identify petitioner initially as the perpetrator, but did so reluctantly later on in the process of the investigation. App. 172, l. 10 – p. 173, l. 2; App. 200, lines 6-12; App. 215, l. 21 – p. 217, l. 3.

In addition, the prejudice was great because credibility mattered in this case where there was no overwhelming evidence against petitioner, and where petitioner did not testify at trial, and where only petitioner and Hollomon were the only two eyewitnesses to the crime, and where there was no other evidence of guilt presented by the state at trial other than Holloman's testimony, and where Hollomon did not initially identify petitioner as the perpetrator.

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; and 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. 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).

CONCLUSION

Based on the argument above, counsel for petitioner would request that this Court reverse the PCR judge's finding and grant PCR relief to petitioner on the above-raised question.

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 October, 2021.