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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

JOSHUA A. REED,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000555

Appeal from Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2022-UP-083

RETURN TO PETITION FOR REHEARING

On March 2, 2022, this Court issued an unpublished, unanimous, per curiam opinion with no precedential value in which it affirmed the PCR court's order denying Petitioner relief. *Reed v. State*, Op. No. 2022-UP-083 (S.C. Ct. App. filed March 2, 2022). Petitioner did not file a petition for rehearing. Nevertheless, the State has petitioned for rehearing.

In a joint trial, Petitioner's counsel failed to object or move for a mistrial or severance when the codefendant's lawyer argued to the jury that although the codefendant would not testify against Petitioner, the codefendant's lawyer knew and conceded that Petitioner was guilty. After noting that the codefendant did not testify at trial, this Court explained that, "During closing

arguments, codefendant’s counsel made statements explaining why codefendant did not testify at trial and implied that he had knowledge from the codefendant that Reed was the shooter.” *Reed v. State*, Op. No. 2022-UP-083 (S.C. Ct. App. filed March 2, 2022). This Court reasoned, “Because the codefendant did not testify or implicate Reed as the shooter, we find that a reasonable attorney would have objected to the codefendant’s closing argument and that Reed’s counsel’s failure to object was deficient under prevailing professional norms.” *Id.* However, this Court ultimately found no prejudice and affirmed the PCR court. *Id.*

The State argues this Court should not have addressed counsel’s deficiency in its opinion and instead, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), should have only disposed of the matter by addressing prejudice. *See* Respondent’s Petition for Rehearing at 2 – 3. However, *Strickland* did not constrain an appellate court from addressing deficient performance. Instead, *Strickland* merely explained that a court is not required to address deficiency “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.” *Id.* at 697.

This Court correctly determined that counsel’s performance was deficient. As the PCR court noted in the order of dismissal, the comments by codefendant’s lawyer “that he was arguing contrary to his own client’s wishes did comprise an unusual comment on his own client’s silence, and offered an explanation not otherwise in evidence.” App. 791. Counsel had a number of ways to respond to or prevent such improper comment but he took none of them. Counsel could have objected given that Petitioner was unable to cross-examine his codefendant’s lawyer. *Crawford v. Washington*, 541 U.S. 36, 42 (2004); U.S. CONST. amend. VI. Counsel could have objected pursuant to the Rules of Professional Conduct since an attorney may not act as an advocate where he is likely to become a witness. Rule 3.7, RPC, Rule 407, SCACR. Counsel

could have objected to the comments as vouching. *See Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Counsel could have headed off the improper argument by moving for severance at the outset of the case. *See Bruton v. United States*, 391 U.S. 123, 137 (1968). Counsel could have moved for a mistrial based on the Confrontation Clause violation. *See State v. Johnson*, 390 S.C. 600, 606-07, 703 S.E.2d 217, 220 (2010). Counsel did not attempt any of these options.

As this Court noted in its opinion, an “attorney’s arguments ‘must be confined to evidence in the record and reasonable inferences therefrom.’” *Reed v. State*, Op. No. 2022-UP-083 (S.C. Ct. App. filed March 2, 2022) (quoting *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997)). No evidence was presented during the trial about why the codefendant chose not to testify and no evidence was presented that the codefendant thought Petitioner was guilty, so the comments were improper. Counsel’s failure to undertake any action to prevent or respond to the improper comment by the codefendant’s lawyer was deficient performance. *See Strickland*, 466 U.S. at 687-88.

This Court’s ruling was correct on the deficient performance prong. Additionally, the petition for rehearing should be denied in the interests of judicial economy.

Respectfully Submitted,

  
JOANNA K. DELANY  
Appellate Defender

This 6th day of April, 2022.

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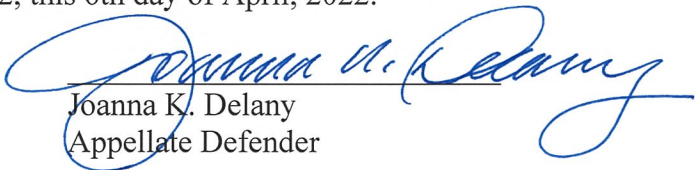
APPELLATE CASE NO. 2018-000555

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Joshua Alexander Reed, #357568, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of April, 2022.

  
Joanna K. Delany  
Appellate Defender

ATTORNEY FOR APPELLANT