

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 30 2013

CLARENCE GIBBS,

S.C. Supreme Court
PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2009-137347

Appeal from Georgetown County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27253

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Clarence Gibbs petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact that by ruling that Petitioner failed to prove prejudice resulting from defense counsel's failure to request a jury charge on alibi given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the majority opinion, in effect, holds that prejudice can never result from defense counsel's failure to request a jury charge on alibi if the remainder of the jury charge as a whole is sufficient. Respectfully, this ruling is inconsistent with this Court's rulings in Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994) and Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). The trial judge's

correct and accurate instruction to the jury on identification, burden of proof and credibility of the witnesses did not provide the jury with a correct and accurate instruction in regard to alibi. Alibi is a specific, long recognized defense in the law. Alibi is not an affirmative defense as insinuated by the solicitor in closing argument. State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959); State v. McGhee, 137 S.C. 256, 135 S.E. 59 (1926).

In the present case, as in Roseboro, the State did not present overwhelming evidence of guilt. In the present case, as in Riddle, the absence of a jury instruction on alibi gave rise to the conclusion by the jury that it was impermissible for them to consider alibi as a defense. In the present case, as in Roseboro, a jury instruction on alibi was necessary to correct any indication from the State's closing argument that the defendant had an affirmative duty to prove alibi. Gibbs suffered prejudice from the lack of an alibi charge.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694,

104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Defense counsel admitted during the PCR hearing that he failed to request a charge on alibi and admitted that the charge should have been given. (App. p. 533, lines 15- p. 534, lines 1-15). The PCR judge found that counsel was ineffective for failing to ensure that an alibi instruction was given to the jury. (App. p. 574). The PCR judge wrote, “This Court finds that Applicant has also proven that trial counsel was ineffective for failing to ensure that an alibi instruction was given to the jury. This Court finds that, had a jury instruction on alibi been requested, the trial Court would have been required to deliver such a charge because it was supported by the evidence presented at trial. See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (trial court must give requested charge if supported by evidence).” (App. p. 574). The PCR judge found, however, that there was not a reasonable probability that the outcome of the trial would not have been different had an alibi charge been given. The PCR judge erred.

“The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error. State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). Counsel’s rejection of the charge at trial constitutes inadequate legal representation.” Riddle v. State, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992). The PCR judge correctly found that trial counsel was ineffective for failing to request an alibi charge. The PCR judge erred in finding that Gibbs did not prove prejudice.

The present case is easily distinguished from Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), where the Court found no prejudice from counsel’s failure to ensure that an alibi charge was given. In Ford there was overwhelming evidence of guilt including DNA evidence, evidence that the defendant and the driver of the car in which the victim was riding were overheard planning the

assault and evidence that the defendant was in possession of the victim's wallet immediately following the assault.

The evidence against Gibbs was not overwhelming. One of the eye-witnesses testified that Gibbs was not the robber. While all three witnesses identified a jacket found in Gibbs' home, there was confusion as to whether the jacket was blue or black. Additionally, the police did not find a gun, money, a black fishing hat or any other evidence linking Gibbs to the Piggly Wiggly robbery. The alibi charge was particularly critical under the facts of this case.

In Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), the Court found prejudice in counsel's failure to request an alibi charge because the State's evidence was wholly circumstantial. Under the facts of Roseboro, the Court found the alibi charge particularly critical. In the present case, the alibi charge was particularly critical because the jury was asked to decide whether to believe the identification witnesses presented by the State or the alibi witnesses presented by the defense. Counsel for Gibbs attempted to challenge the reliability of the identification witnesses¹ and presented alibi evidence. The strategies of attempting to challenge identification evidence and presenting alibi evidence were not mutually exclusive. Based on the facts of this case, Gibbs was prejudiced by the lack of an alibi instruction.

Counsel should have requested that the judge instruct the jury on the law of alibi. Gibbs presented evidence that he was not at the Piggly Wiggly when it was robbed and in fact was at home watching television with his mother and girlfriend at the time of the robbery. If requested, the judge should have given the following instruction:

Alibi is not an affirmative defense imposing upon the accused the burden of its proof. It does not require testimony of the accused or of witnesses produced by him. It may be established as well by the

¹ The Court of Appeals found that the challenge to the identifications was not preserved. State v. Gibbs, 2007-UP-333 (S.C. Ct.App. filed June 27, 2007).

testimony of witnesses for the prosecution. If the nature of the crime is such that the presence of the accused at the place and time of its commission is essential to his guilt, the burden is upon the State to prove beyond a reasonable doubt that he was then and there present. Where the evidence, taken as a whole, whether adduced by the prosecution or by the accused, is sufficient to raise in the minds of the jury a reasonable doubt as to his presence at the scene of the crime, he is entitled to acquittal.

State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959), cert. denied 363 U.S. 846, 80 S.Ct. 1616, 4 L.Ed.2d 1728 (1960), citing 23 C.J.S. Criminal Law § 923, p. 200; State v. McGhee, 137 S.C. 256, 135 S.E. 59; State v. Floyd, 174 S.C. 288, 177 S.E. 375; State v. Bealin, 201 S.C. 490, 23 S.E.2d 746.

Failure to charge a requested instruction on alibi would have constituted reversible error. See State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980).

In Riddle v. State, 308 S.C. 361, 363-364, 418 S.E.2d 308, 309-310 (1992), this Court, finding counsel ineffective in failing to request an alibi charge, wrote:

The prejudice of this error was compounded by the following remarks of the Solicitor in closing argument:

The question is, did he do it? Alibi? That's what he said, I wasn't there and that's the only defense. Don't go in that jury room and try to make up legal defenses or any kind of street defenses. His Honor will charge you what legal defenses you can look at and the only defense that you can look at in this case is alibi....

Subsequently, the absence of a charge on alibi gave rise to a conclusion by the jury that it was impermissible for them to consider alibi as a defense.

In the present case the prejudice arises from the fact that the jury was not properly instructed that if the alibi evidence is sufficient to raise in the minds of the jury a reasonable doubt as to the defendant's presence at the scene of the crime, he is entitled to acquittal. The jury was not instructed that alibi was not an affirmative defense imposing upon the defendant the burden of proof. In closing argument the State argued:

Now, the whole thing about this station, well, it must be clear to you that the Defense, the Defense has no burden to put up evidence, they don't, and I'm not suggesting they do. It's very important you understand that. He has a constitutional right not to testify, but they chose to do that, and when they chose to do that they made a decision. What evidence didn't you hear? Use your common sense. If that episode of JAG aired on Sunday, April 10, 2005, on whatever channel that they received **don't you think they could prove it**. Use your common sense. What day of the week does JAG come on? There's no red herring there and there's no polite way to say it. That is an effort to get you to believe that he wasn't there, and I think you can see through it and you can tell that it's a lie. (emphasis added).

(App. p. 457, lines 2-17). Without a proper charge on alibi, the State's closing argument improperly gives the impression to the jury that the defendant had an affirmative duty to prove alibi. Gibbs suffered prejudice from the lack of an alibi charge.

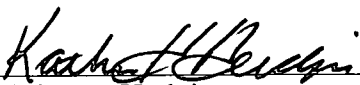
In finding no prejudice from defense counsel's failure to request a jury charge on alibi, the majority of the Court in the present case held, "Given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the PCR court's finding of no prejudice must be sustained under the any evidence standard of review." As Chief Justice Toal wrote, however, in footnote 11 of the dissent, "Likewise, the majority relies on this portion of the jury charge to support its conclusion that the PCR court's finding of no prejudice is supported by evidence in the Record. However, the legal concepts of alibi and credibility are not the same." The trial judge's correct and accurate instruction to the jury on identification, burden of proof and credibility of the witnesses did not provide the jury with a correct and accurate instruction in regard to alibi.

The State did not produce overwhelming evidence of guilt. The absence of a jury instruction on alibi gave rise to the conclusion by the jury that it was impermissible for them to consider alibi as a defense. A jury instruction on alibi was necessary to correct any indication from the State's closing argument that the defendant had an affirmative duty to prove alibi. Based on

the facts of this case, Petitioner Gibbs suffered prejudice by defense counsel's failure to request an alibi instruction. The majority opinion finding no prejudice is inconsistent with this Court's rulings in Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994) and Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). The majority holding departs from Roseboro and Riddle by requiring an additional error in the jury instruction in order to prove prejudice from defense counsel's failure to request an alibi instruction. Based on the majority opinion, a PCR applicant could never prove prejudice from defense counsel's failure to request an alibi instruction if the jury instruction correctly addresses identity, burden of proof and credibility of the witnesses. Claims of ineffective assistance of counsel based on defense counsel's failure to request an alibi instruction should be evaluated on a case by case basis, pursuant to the guideline established in Roseboro and Riddle, not by a per se rule of resulting prejudice from the failure to request or from a per se rule of no prejudice unless there is an additional error in the jury charge, as the majority opinion now holds.

Petitioner Gibbs was denied the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Defense counsel was ineffective in failing to request a jury charge on alibi. Under the facts of this case and based on the guidelines set forth in Roseboro and Riddle, Petitioner was prejudiced by counsel's deficient performance. Counsel respectfully asks this Court to reconsider the decision, to find prejudice and to grant a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 30th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

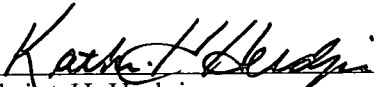
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Clarence Gibbs Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210 this 30th day of May, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 30th day
of May, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.