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Feb 16 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable William A. McKinnon, Circuit Court Judge

RICHARD DOUGLAS WALDRUP,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001380

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where counsel failed to call Petitioner's brother as a witness at trial, where his brother would have testified that Petitioner did not intend to commit a crime when he was going to visit an old family friend?

STATEMENT

On June 22, 2017, a Cherokee County jury indicted Petitioner on one count of burglary in the first degree. App. 318. He proceeded to trial before the Honorable J. Mark Hayes, II and a jury on March 5, 2019.

Travis Moore represented Petitioner; Adrienne Barry and Kim Leskanic appeared on behalf of the state. At the conclusion of trial, the jury found Petitioner guilty as indicted. App. 163 ll. 10 – 13. Judge Hayes sentenced him to twenty years' incarceration and gave him credit for time served. App. 169 ll. 12 – 14.

Petitioner filed an application for post-conviction relief on July 26, 2021. App. 171. He alleged ineffective assistance of counsel. App. 179 – 186. The state made its Return on or about January 19, 2022. App. 214 – 237.

An evidentiary hearing was held before the Honorable William A. McKinnon on June 7, 2022. App. 239. Rodney Richey represented Petitioner; Chelsey Marto appeared on behalf of the state. Petitioner, two members of his family, and trial counsel testified at the hearing. The PCR judge took the matter under advisement. App. 295 l. 7.

An Order of Dismissal was filed on September 14, 2022. App. 299. The PCR court denied relief as to five primary allegations: 1) failure to call/contact witnesses; 2) brevity of time; 3) failure to discuss trial strategy; 4) failure to obtain criminal history; and 5) failure to review discovery. App. 311 – 315. PCR counsel did not file a motion to alter or amend under Rule 59(e), SCRCP.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where counsel failed to call Petitioner's brother as a witness at trial, where his brother would have testified that Petitioner did not intend to commit a crime when he was going to visit an old family friend.

Relevant facts

Teresa Smith alleged that on the morning of April 15, 2017, she found Petitioner in her garage, holding a saw. App 61 l. 18 – App. 62 l. 25. She testified at trial that Petitioner had never been to her home and did not have permission to be there. App. 72 l. 25 – App. 73 l. 3. When she accosted him, he ran. Id. Smith's son, who was in the house at the time at the time, restrained Petitioner until police arrived. App. 64 ll. 1 – 15.

Billy Austin, Smith's son, testified during the state's case-in-chief that he overheard his mother questioning Petitioner. App. 100 ll. 12 – 20. He grabbed Petitioner and slammed him up against a wall. App. 101 ll. 4 – 8. Brent Heflin, an officer with the Gaffney Police Department, arrived at the house and detained Petitioner. App. 52 ll. 5 – 14. Heflin was the first officer on the scene. Id.

Following Austin's testimony, the state rested. App. 114 ll. 11 – 12. Petitioner testified in his own defense. App. 122.

Prior to trial, the state put on the record the previous plea offers. App. 6 ll. 2 – 13. The first offer was to reduce the charge to burglary in the second degree, a twelve-year sentence followed by probation; that offer was rejected. Id. The state then agreed to do a ten-year negotiated sentence, followed by probation; that offer was also rejected. Id. The state's third and final offer was a recommended sentence of ten years, followed by probation; that offer was also rejected. Id.

As noted above, Judge Hayes sentenced Petitioner to twenty years' incarceration. App. 169 ll. 12 – 13. Trial counsel did not object or move to reconsider the sentence or claim any sort of "trial tax" violation.

At the PCR evidentiary hearing, Petitioner's brother, Robert, testified. App. 242 ll. 13 – 16. He corroborated Petitioner's trial testimony, that Petitioner went to the house to see an old acquaintance—Tony Young. App. 243 ll. 4 – 5. Young was Robert's brother-in-law's brother. App. 243 ll. 9 – 11. Robert testified that Petitioner had no intent to burglarize Smith's home. App. 245 ll. 1 – 3. When asked why he did not testify at trial, Robert stated that he was not notified by trial counsel that Petitioner's trial was going forward. App. 245 ll. 16 – 18.

Crystal Anderson also testified at the PCR evidentiary hearing in support of Petitioner's case. App. 249. She clarified that Young is her mother's sister's husband's brother. App. 249 ll. 1 – 5.

Petitioner then took the stand and remarked how counsel failed to secure Robert's testimony at trial. App. 253 ll. 7 – 10. According to Petitioner, counsel only visited him three days before trial. App. 253 ll. 7 – 14. Because they only met for fifteen minutes, they did not have sufficient time to develop a trial strategy. App. 257 ll. 12 – 15.

Additionally, Petitioner claimed counsel failed to communicate with him during the pendency of his representation. App. 255 ll. 10 – 23. Moreover, counsel failed to provide discovery and other documents to Petitioner. App. 265 ll. 5 – 25. The two—Petitioner and counsel—never spoke about the state's potential witnesses or the discovery in the case. App. 266 ll. 12 – 25; App. 267 ll. 22 – 25; App. 268 ll. 14 – 17.

Regarding the failure to call and/or contact witnesses, the PCR court concluded "Counsel did not render deficient performance and in any event [Petitioner] has not shown that he suffered prejudice." App. 312. As a result, the court declined to grant relief on the claim.

Discussion

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts "reweigh the evidence in aggravation against the totality of available mitigating evidence." Id. Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." Id. at 537, 123 S.Ct. 2527 (citation omitted). A "reasonable probability" is less than a preponderance of the evidence but still "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

In Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019), this Court reversed the PCR court's denial of post-conviction relief and remanded for a new trial. Martin was convicted of armed robbery and criminal conspiracy; he alleged his trial attorneys were ineffective for failing to elicit testimony from his mother regarding the specific timeline of his alibi. Id. at 453, 832 S.E.2d at 278. Martin's mother testified in his defense at trial, but counsel did not question her

about a statement she had given to them that would have established an alibi defense. Id. at 453, 832 S.E.2d at 279. Martin's trial counsel admitted they were aware of this information. Id. at 453, 832 S.E.2d at 279. This Court held "as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother." Id. at 456, 832 S.E.2d at 280.

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The Victim reviewed surveillance footage from the gas station where she alleged that she met her assailant, who offered to help her when her car would not start. Id. A gas station employee identified Walker as the man pointed out by the Victim on the video. Id. When interviewed by police, Walker admitted going to the gas station but denied offering any help to anyone there or any involvement with the alleged victim. Id. He said he spent the afternoon and evening at a friend's home and then returned to his girlfriend Robina Reed's home around 9:30 or 10:00 p.m. for the remainder of the night. Id.

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. 407 S.C. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed" in her notes to interview but never did. Id. Though she said that her investigator spoke with or tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and

Walker spent every weekend together prior to his arrest. Id. The PCR court granted Walker's application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that Walker was not prejudiced. Id.

This Court recognized that Reed's testimony at Walker's PCR hearing vacillated but finally settled on an answer that "prior to Walker's arrest, she and Walker spent every weekend together." 407 S.C. at 406, 756 S.E.2d at 147. Thus, there was evidence to support the PCR court's conclusion that Reed's testimony reasonably could have resulted in a different outcome at trial. Id. "If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. "In other words, unlike Glover where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147.

In Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida at 8:30 *a.m.* on the day when the crimes were committed. A majority of the South Carolina Supreme Court found that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg County was only a six and a half hour drive from the witness' home in Florida. 318 S.C. at 498, 458 S.E.2d at 540. Thus, Glover's witnesses did not provide an alibi. Id.

Petitioner's brother would have offered favorable testimony at trial. He could have substantiated Petitioner's testimony that he went there to see Tony Young. Additionally, Petitioner's brother Robert could have testified that Petitioner had no intent to burglarize Smith's

home. App. 245 ll. 1 – 3. But for counsel's failure to notify Robert that the case was going to trial and the accompanying failure to call him to testify, the outcome at trial would have been different. Counsel was deficient for failing to contact and call Robert, and the resulting prejudice manifested in the guilty verdict and accompanying twenty-year sentence.

Accordingly, the PCR Court erred in holding that trial counsel provided effective assistance of counsel because Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari in order to allow further briefing.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of February, 2023.

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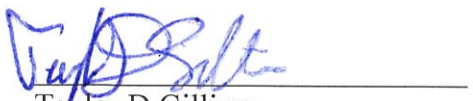
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard Douglas Waldrup states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge William A. McKinnon, which was held on June 7, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Richard Douglas Waldrup.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of February, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 16th day of February, 2023.