

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable R. Ferrell Cothran, Circuit Court Judge

SYLVESTER SCOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000624

PETITION FOR WRIT OF CERTIORARI

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Trial counsels erred in failing to prepare an alibi witness to testify prior to trial because the alibi witness’ testimony at trial was woefully inadequate and undermined petitioner’s alibi defense so severely that the trial ended abruptly thereafter, and petitioner was immediately coerced into pleading guilty as charged by default despite the fact that the state’s case, which was largely circumstantial, lacked substantial circumstantial evidence sufficient to have secured convictions on the charges filed against petitioner. 3

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ISSUE PRESENTED

Trial counsels erred in failing to prepare an alibi witness to testify prior to trial because the alibi witness' testimony at trial was woefully inadequate and undermined petitioner's alibi defense so severely that the trial ended abruptly thereafter, and petitioner was immediately coerced into pleading guilty as charged by default despite the fact that the state's case, which was largely circumstantial, lacked substantial circumstantial evidence sufficient to have secured convictions on the charges filed against petitioner.

STATEMENT

Petitioner Sylvester D. Scott entered Alford¹ pleas to armed robbery and possession of a weapon during the commission of a violent crime during the March 2019 term of the Charleston County General Sessions Court before Judge Roger M. Young, Senior, and was sentenced to imprisonment for an aggregate period of twenty-years. App. 1- 542. Attorneys John J. Kozelski and Susannah R. Knox represented petitioner at the guilty plea proceeding, and Assistant Solicitor Thomas R. Waring appeared on behalf of the state. Petitioner did not appeal his guilty pleas or sentences.

On June 18, 2019, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 543-549. The respondent filed a Return dated October 17, 2019. App. 550-554.

A PCR hearing in the case was convened on April 18, 2022, at the Charleston County Courthouse before Judge Ferrell Cothran, Junior. App. 556-594. Petitioner was present at the PCR hearing and represented by Attorney James K. Falk, and Assistant Attorney General Samantha J. Weidauer appeared on behalf of the state.

On March 31, 2023, Judge Cothran issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsels in the case. App. 596- 620.

Petitioner appealed the Order of Dismissal. This petition follows.

¹ 400 U.S. 25 (1970).

ARGUMENT

Trial counsels erred in failing to prepare an alibi witness to testify prior to trial because the alibi witness' testimony at trial was woefully inadequate and undermined petitioner's alibi defense so severely that the trial ended abruptly thereafter, and petitioner was immediately coerced into pleading guilty as charged by default despite the fact that the state's case, which was largely circumstantial, lacked substantial circumstantial evidence sufficient to have secured convictions on the charges filed against petitioner.

In the case at bar, petitioner was charged with the armed robbery of a bank that occurred on March 4, 2015. Apparently, a distinctive-looking vehicle was seen leaving a bank parking lot on the same date and time of the bank robbery in question. There was evidence offered establishing that petitioner was driving this distinctive-looking vehicle on the same date of the bank robbery, which the state used as evidence to place petitioner at the crime scene.

At trial, Alonzo Green testified that on March 4, 2015, he and Anthony Holsberg were at a Best Western Hotel in Charleston, South Carolina, when petitioner came to their room to visit. Green recalled that petitioner wore an orange (or red) and white shirt on that day. Per their conversations, an agreement was reached wherein petitioner would drive Holsberg's distinctive-looking vehicle (Gray Dodge Charger with fancy rims and black top) to search for heroin. Green stated that he had no knowledge of petitioner's whereabouts or activities after he departed, but only knew that petitioner returned later empty-handed and stated that he could not find any drugs. App. 215, l. 21 – p.231, l. 10. Anthony Holsberg was deceased at the time of the trial.

No eyewitnesses from the bank could identify the masked perpetrator who walked in and committed the armed robbery other than to state that the perpetrator wore a red and white striped

top under dark blue coveralls. However, one bank employee saw a distinctive-looking vehicle leave the bank parking lot after the robbery. App. 159, l. 6 – p. 164, l. 4.

At trial, petitioner presented an alibi defense in the case. Petitioner's defense was that he was in North Charleston helping an elderly lady named Harriet Cordero repair her moped when the bank robbery in question occurred in Charleston. Cordero, who was 70 years old at the time of the trial, testified at trial in support of petitioner's alibi defense by verifying that petitioner was with her on the afternoon of March 4, 2015, when the bank robbery occurred, and that petitioner helped repair her moped at that time. On cross examination Cordero testified as follows:

Q: When did you first become aware [petitioner] had been arrested for bank robbery?

A: When he...who asked about that. App. 521, lines 17-19.

Q:...And that date, (arrest) would have been on May the 8th, over two months after the incident. Does that sound about right?

A: Man, I'm 70 years old, I don't remember the dates or nothing like that, no but when she talked to me, I told her what happened, and that was it.

Q: You told her what happened over two months ago on an insignificant day, on March 4th, is that correct?

A: That wasn't a significant date. App. 522, lines 5-13.

Q: ...What I'm asking you is two months after the incident, how did you know that happened (moped ran hot) on March the 4th?

A: Because I was told.

Q: Because you were told?

A: Yes.

Q: You were told by the investigator?

A Yes. App. 522, lines 18-25.

Q: And she told you what happened on March 4th, correct?

A: She told me when...I don't know the exact date, but it was written down, though. App. 523, lines 6-9.

Note that the trial was held four years after the bank robbery occurred, and that the alibi witness was 70 years old at the time of the trial.

During the PCR hearing, trial counsel stated that he informed the jury in his opening statement that an alibi witness would testify in the case, but that he (counsel) never spoke directly to this alibi witness prior to trial. Trial counsel stated that the situation became embarrassing and problematic on cross-examination of the alibi witness when said witness admitted that the moped event, which was presented in support of the alibi, took place on a date (alibi date) that she could not recall, but that she remembered the alibi date after the person who conducted the interview "told" her the date on which petitioner was in her presence, i.e., the exact alibi date. Trial counsel stated that this bungled testimony made it appear as though the alibi defense was fabricated and not credible at all. Trial counsel admitted that he had no interactions with the alibi witness prior to trial, and that he relied on co-counsel, who interviewed and took a statement from the alibi witness, to handle that aspect of the defense. Counsel stated that after the disastrous alibi testimony on cross examination ended, the defense was nullified, and the case closed with petitioner's decision to plead guilty as charged. App. 573, l. 6 - p. 580, l. 19. Trial counsel added that diminished capacity and fragility were possible issues surrounding the alibi witness' testimony given in the case. App. 584, l. 20 – p. 585, l. 14.

Furthermore, counsel admitted at the PCR hearing that he failed to prepare the alibi witness for trial per the following testimony:

PCR Counsel: As far as prep for Ms. Cordero, you said that was done immediately after the incident?

Counsel: We took a statement from her prior to this incident, but I don't think that we had reached out to her in that five-years other than, you know, a few weeks before trial to make sure she still remembered the statement she had given us. App. 583, l.23- p. 584, l. 4.

Co-counsel stated at the PCR hearing that she spoke with the alibi witness by telephone a week prior to trial to verify the witness' account of the story, but admitted that she did not prepare the witness for the line of questioning that was taken by the solicitor on cross-examination regarding the alibi date in the case. App. 589, l.13 - p. 590, l. 23.

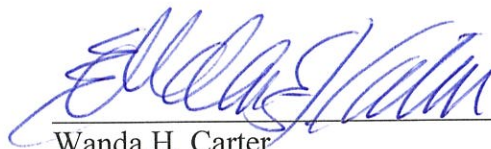
Petitioner testified at the PCR hearing and explained that a ten-year offer was submitted, but that he did not accept it because the state's case contained weak circumstantial evidence, and because he had an alibi witness available to testify that he was in North Charleston assisting her with the repair of her broken moped when the bank robbery occurred in Charleston. Petitioner stated that he was in effect coerced into pleading guilty after the alibi witness' catastrophic testimony transpired as this singularly doomed his defense. App. 560, l. 21 – p. 572, l. 1. Petitioner concluded that trial counsels did not sufficiently investigate the alibi witness defense. App. 572, lines 2-6.

Witness preparation enables lawyers to present witnesses who are thoroughly familiar with the subject matter of the case and prepared to testify in a clear and concise manner. Geders v. United States, 425 U.S. 80 (1976). In State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979), the Court held that it is not improper for an attorney to prepare a witness for trial and go

over questions and answers so that the witness will be ready for court and know what to expect in order to give effective testimony. “Horseshedding” or meeting with and preparing a witness to testify at trial is a well-established practice that is a duty of an attorney to perform. State v. Earp, 319 Md. 156, 571 A.2d 1227 (1990). Therefore, a lawyer who does not prepare a witness for trial has engaged in deficient legal representation. Here, trial counsel, who was the lead counsel, never met or talked with the alibi witness before his direct examination of her on the witness stand at trial. Additionally, co-counsel met with the alibi witness shortly before trial for the first time after they met four years before, but failed to prepare said witness for trial. Thus, trial counsels’ representation in this case constituted defective legal assistance. Petitioner was prejudiced by counsels’ ineffectiveness in failing to prepare the alibi witness to testify at trial because said witness stumbled and appeared unbelievable upon cross-examination by the solicitor regarding the alibi date. This eliminated the alibi defense, which ultimately led petitioner to enter guilty pleas in the case. The catastrophe of the failed alibi defense was exacerbated by the fact that the state’s case was largely circumstantial and lacked the substantial circumstantial evidence needed to obtain convictions on the state’s charges filed against petitioner in the case. Thus, counsels’ legal representation of petitioner at trial fell below the competence level required of criminal attorneys in violation of the Sixth Amendment (see Strickland v. Washington, 466 U.S. 668 (1984)), such that but for counsels’ errors, a reasonable probability exists that the outcome petitioner’s case would have ended differently.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue in the case.



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ATTORNEY FOR PETITIONER

This 2nd day of August, 2023.