

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2023-000741

King Conyers,

Petitioner,

vs.

The State of South Carolina,

Respondent.

REPLY BRIEF

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S.C. SUPREME COURT

ARGUMENTS

I. The PCR court erred in concluding that trial counsel was not ineffective for failing to call Petitioner's alibi witness.

The State argues that the ruling of the PCR court that trial counsel was not ineffective for failing to call Petitioner's alibi witness was correct because the alibi witness's testimony would have opened the door to the State calling the witness's sister to refute the alibi and because her alibi testimony would not have changed the outcome of the trial because, even if true, the cell tower evidence showed the phone linked to Petitioner was in the area at the time of the murder. Respondent's Brief p. 8.

However, this argument ignores the Court of Appeals' decision in *Weldon v. State* and its applicability to the facts at hand. In the case of *Weldon v. State*, the South Carolina Court of Appeals held that trial counsel's failure to call an alibi witness was ineffective assistance of counsel. *Weldon v. State*, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021). In that case, the defendant's mother and sister were present at trial and trial counsel had asked them to testify as alibi witnesses. *Id.* at 77. Trial counsel never actually called them as witnesses and he testified at PCR that he had filed a notice of an alibi defense but that he "may have declined to call the witnesses because the State might have then called rebuttal witnesses to challenge the alibi testimony and because he wanted to have the last closing argument." *Id.* at 83. The Court found this reasoning insufficient.

The same thing occurred in this case. Petitioner repeatedly asked trial counsel to interview his alibi witness, Vondayna Brown, who would have testified that Petitioner was with her at her niece's birthday party the night of the murder. App. 2637-2638. Trial counsel testified that he talked to Brown and filed a notice of alibi defense with the State,

intending to call Brown as a witness but he failed to call her as an alibi witness because Brown had car trouble on the day she was intended to testify and trial counsel failed to subpoena her to ensure her appearance at court and failed to move for a continuance to ensure this essential witness was present to testify on Petitioner's behalf. App. 2606. He testified he was not concerned that she did not testify because he believed the State would have called her sister to rebut her testimony anyway. In *Weldon*, this reasoning was not sufficient. It should not be sufficient in this case either.

Respondent further argues that the testimony would not have changed the outcome of the trial because the cell phone tower evidence placed Petitioner at the scene of the crime during the time of the murder. Brown would have testified Petitioner was with her at her niece's birthday party on the night of the murder, wholly exculpating his participation in the crime. That certainly would change the outcome of the trial. The cell phone evidence, as discussed below, was not properly linked to Petitioner and should not have been allowed either so to rely on it as evidence that the outcome at trial would not have changed is misplaced.

Based on the arguments in Petitioner's brief and this reply, trial counsel provided ineffective assistance of counsel in violation of Petitioner's Sixth Amendment right to counsel.

- II. The PCR court erred in concluding that trial counsel was not ineffective for failing to investigate and prepare for trial regarding the telephone evidence presented at trial, specifically, failing to present evidence that Petitioner was not the owner or user of the phone alleged at trial.**

The State argues the ruling of the PCR court finding that trial counsel was not ineffective was accurate because Petitioner failed to enter any additional evidence counsel would have discovered upon a further investigation. Respondent's Brief p. 11.

The State's argument fails to address that trial counsel admitted he did not try to figure out who owned the phone and he explained it away by rationalizing that the issue was use of the phone, not ownership. He did not articulate any reason why he did not look into this issue, try and determine how he could prove Petitioner did not own or use the phone, or pay this essential issue much thought at all in preparation for trial. He also failed to present a witness who would have testified the phone did not belong to Petitioner, his girlfriend, Ms. Brown, for the reasons stated above.

Petitioner did present evidence of what trial counsel would have found had he prepared adequately for trial. Ms. Brown testified at PCR that had she been given the opportunity to testify at trial she would have testified that the cell phone number never belonged to Petitioner. Trial counsel's ineffective assistance is what led to Ms. Brown's lack of testimony at trial and her testimony would have been essential to prove that Petitioner had never been associated with this phone number. Trial counsel did not do the preparation required to find this information out and insist on her testimony at trial. This evidence placed Petitioner at the scene of the crime, therefore, it was paramount that trial counsel refute the evidence and he failed to adequately prepare for trial and attempt to do so.

Based on the arguments in Petitioner's brief and this reply, trial counsel provided ineffective assistance of counsel in violation of Petitioner's Sixth Amendment right to counsel.

III. The PCR court erred in concluding that trial counsel was not ineffective for failing to object to the State's closing argument.

Respondent argues that the PCR court's ruling that trial counsel was not ineffective by failing to object to the State's closing argument was correct because the solicitor's comments were not improper. Respondent's Brief p. 13. Respondent argues that the comments are not improper because they referred to evidence admitted at trial and did not convey the solicitor's personal impression. Respondent' Brief p. 15.

During the closing argument, the solicitor told the jury, "[I]et's talk a minute about the culture of these guys. They're criminals. But we don't understand it. But they do. You don't ask questions. You don't talk to the police. There's a code. You don't snitch. You don't trust anybody. You don't flinch, or think it's odd when you're at a woman's house and everybody has a loaded weapon. Ecstasy, cocaine, marijuana. And you protect your associate. That's their culture." App. 1137.

The solicitor suggested to the jury that he had decided Petitioner was guilty and not only was he guilty in this case, he was a criminal and he had his own criminal culture and criminal rules to abide by. When questioned about trial counsel's failure to object to this comment, trial counsel testified he did not object because he did not want to draw attention to the comment and he only objects when he knows the judge will sustain the objection. App. 2613-2614.

This Court has stated in *Stone v. State*, 419 S.C. 370, 386, 798 S.E.2d 561, 570 (2017), how important it is to object: “Without an objection, however, there can be no debate[,] and the trial court has no opportunity to exercise its discretion.” Further, “[t]he fact the trial court has such wide discretion does not justify the decision not to object. Rather, the debate that precedes the exercise of that discretion is part of the adversarial process” trial counsel is required to test. *Id.*; see also *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (“When evaluating the reasonableness of counsel’s conduct, ‘the court should keep in mind that counsel’s function ... is to make the adversarial testing process work in the particular case.’” (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052)).

Choosing not to object was unreasonable. This comment improperly suggested to the jury the solicitor’s personal impression that the defendant was not only guilty in this case, but by nature a criminal. This comment unfairly prejudiced Petitioner to the jury and deprived Petitioner of his right to counsel.

Based on the arguments in Petitioner’s brief and this reply, trial counsel provided ineffective assistance of counsel in violation of Petitioner’s Sixth Amendment right to counsel.

IV. The PCR court erred in concluding that trial counsel was not ineffective for failing to communicate with Petitioner and review evidence.

Respondent argues that the ruling of the PCR court was correct that trial counsel was not ineffective because trial counsel testified to the specific details about the discovery in Petitioner’s case and Petitioner’s testimony indicated trial counsel discussed discovery with him. Respondent’s Brief p. 17.

Respondent claims that trial counsel testified as to the specific details of Petitioner's case which somehow means that he also communicated and reviewed that evidence with Petitioner. However, trial counsel did not testify that he reviewed the discovery with Petitioner or that he sent it to Petitioner to have him review himself. All trial counsel testified to was his typical practice in handling discovery, not what he specifically recalled doing in this case. Furthermore, he specifically testified that he did not share the phone records with Petitioner but he could not recall what he did share with him. Petitioner testified that he never received his discovery and trial counsel told him two of his co-defendants would testify against him and the State had "some cellphone numbers, none linking to [Petitioner]." App. 2632. Petitioner further testified that he met with counsel "at least three or four times" for "ten, fifteen minutes, maximum." App. 2629. Petitioner testified at PCR that he did not know the State was going to introduce evidence that the number ending in 9516 was used by him. Had trial counsel disclosed this discovery to Petitioner and spent more time discussing it with Petitioner, they could have planned how to present evidence proving this number was not used by Petitioner and changed the outcome of Petitioner's trial as this evidence placed Petitioner with all the co-defendants, at the scene of the crime. Trial counsel failed to do so and failed to review discovery with Petitioner.

Based on the arguments in Petitioner's brief and this reply, trial counsel provided ineffective assistance of counsel in violation of Petitioner's Sixth Amendment right to counsel.

V. The PCR court erred in concluding that Petitioner is not entitled to relief based on newly discovered evidence.

Respondent argues that the PCR court did not err in ruling that Petitioner was not entitled to relief based on newly discovered evidence because Mason's affidavit and testimony from

Belton's trial were inadmissible hearsay and Belton's testimony was not material to Petitioner's guilt or innocence. Respondent' Brief p. 18-19.

Respondent argues that because Belton testified that he was not at the crime scene and not with Petitioner that it was not material to Petitioner's guilt or innocence because he could not testify that Petitioner was not at the crime scene. This argument wholly ignores the State's theory of this case which was that Petitioner was partying with a group of people from Charleston, to Columbia, to Charlotte, and to the crime scene and that Petitioner was one of that group. Specifically, the State's version of events was that Belton was the driver, he drove to West Columbia and picked up Petitioner with all the other codefendants already in the car. App. 1129. However, this testimony from Belton contradicts that because Belton himself testified that he was there with these people leading up to them going to the crime scene and Petitioner was not with them. Further, Belton's testimony was ultimately believed and his PCR was granted. App. 2729-2741. Belton's testimony proved Petitioner was not in the group, which was the theory of the case presented by the State, and what they attempted to prove through the cell phone evidence which they claimed belonged to Petitioner. That testimony was certainly material and would have changed the result in a new trial because it would have added to the reasonable doubt in the mind of the jury. Coupled with the lack of physical evidence linking Petitioner to the crime and the fact that the two surviving victims of the home invasion testified that there were two or three people in the home during the invasion which suggests that Mason, Caldwell, and Delaney were the ones who entered the home and no one else (Delaney was shot and killed and Mason and Caldwell's DNA was found at the scene). That lack of physical evidence, coupled with credible testimony from Belton stating Petitioner was not in their group, as well as the credible testimony of the

victims of the home invasion amounts to reasonable doubt in the minds of the jury. This was certainly material to Petitioner's guilt or innocence.

Respondent's argument that the testimony was inadmissible hearsay is an incorrect application of law. Mason was clearly unavailable as he invoked his right against self-incrimination during Petitioner's PCR evidentiary hearing. His previous testimony was given as a witness at another proceeding of a PCR regarding the same jury trial of Petitioner where he was a codefendant. During said testimony, the State had the opportunity to cross examine him about his trial testimony and his recantation of said trial testimony. Rule 804 states that the State must have a similar motive to cross examine, not an identical one. Proving the witness's recantation is false was the State's purpose in both PCR hearings. That was sufficient to meet the requirements of Rule 804(b)(1). The PCR court erred in ruling this testimony was not admissible to show the newly discovered evidence of Troy Mason's recantation of his trial testimony against Petitioner. Troy Mason's recantation of his trial testimony meets the requirements to grant a new trial as well. The testimony would likely change the result in a new trial, it was discovered since the trial, it could not by the exercise of due diligence have been discovered before the trial, it is material to the issue of guilt or innocence, and it is not merely cumulative or impeaching. Respondent's argument to the contrary is repeating the PCR court's ruling and both are misplaced.

Based on the arguments in Petitioner's brief and this reply, trial counsel provided ineffective assistance of counsel in violation of Petitioner's Sixth Amendment right to counsel.

CONCLUSION

Respectfully, Mr. Conyers asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,
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