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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Greenville County Court of Common Pleas
The Honorable G.D. Morgan, Jr., Circuit Court Judge

JAMES MICHAEL JOHNSON, #340206,Respondent,

v.

STATE OF SOUTH CAROLINA,Petitioner.

Appellate Case No. 2023-001191

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF FACTS

Prior to the Applicant's trial defense counsel was provided with pre-trial discovery material. (App. at 273-278; App. at 381-427). Discovery material included the cell phone records for James Johnson (Applicant), Manuel Nicholas Granados ("Granados" or "Inside Man"), Christopher Porcoro ("Victim One", "Victim Two" was the ex-girlfriend of the "Shooter" Scott Lowe), Coroner's reports, 911/EMS reports. Greenville County 911/EMS records showed a fire call to the murder scene was received at 10:13 a.m. The record from Applicant's General Session's trial shows that Granados was the Shooter's inside man at Victim One's house waiting for the victims to go to sleep so he could let the Shooter in the house so the Shooter could steal the Victim One's drugs and money. (App. at 933-935).

Cell phone records show that the last call made from victim Christopher Porcoro's phone was at 8:22 a.m. the morning of the murders. Granados' cell phone records show a sudden gap between 9:37 a.m. to 10:17 a.m. in Granados' otherwise constant cell phone usage. (App. at 44-45; App. at 381-408). The coroner's reports which showed the time of death for both victims as 10:00 a.m. (App. at 168-169; App. at 458-463).

There was an abundance of evidence known to defense counsel prior to trial that established the time of the murders between 9:37 a.m. and 10:00 a.m. Applicant's cell phone records show Applicant's phone was sending and receiving texts throughout the day of the murders including texts at 8:52 a.m., 9:03 a.m., 9:14 a.m., 9:33 a.m., 9:56 a.m., 10:07 a.m. and 10:46 a.m. (App. at 176-179; App. at 419-457). Location data from the cell phone records show that all of those text messages were sent or received through the cell tower servicing the Applicant's home. (App. at 92-94; App. at 419-427). Despite its exculpatory value, none of this was shown to the

jury.

Defense Counsel admitted at Applicant's hearing that he did not know how to use the cell phone records. "Essentially we could not nail down the information with enough certainty to feel like we could do that", "we did not feel confident enough that we had - -were able to nail down a location." (App. at 180-181).

Former Greenville County Sheriff's Deputy of 27 years and former Sheriff's Office Homicide Supervisor and licensed private investigator, Paul Silvaggio, (App.at 102-103) testified at the PCR hearing on behalf of the Applicant that using the trial transcript, incident reports, and relevant addresses that he timed, measured, averaged and used different times of day to determine the distances and timing to the locations pertinent to the murder scene, applicant's home, and the drop-off of a co-defendant. (App. at 103-109). He determined that the round-trip drive between the Appellant's house and the murder scene, on the route testified to by the shooter at Applicant's trial, was approximately 14 minutes and that Google timed the travel at 17 minutes (App. at 108). Evidence from the Applicant's trial also shows that after the murders, furniture, blankets and things were place over the victims and there was an attempt to set the house on fire and stage the murder scene to look like meth lab explosion, all of which would have necessarily added a significant amount of time that the perpetrators would have had to remain at the murder scene. (App at 195-197).

At the Post Conviction Relief Hearing, Ben Levitan was qualified as an expert in cell phone technology including interpretation of data location information from cellular records. (App. at 69 and 71). He spent 30 years in the design and development of the worldwide cell phone network and is part of a group of engineers that actually set up the network. He worked for Verizon, Sprint,

Nextel, Alltel and GTE and has been an independent consultant for the past 12 years. (App. at 53-54). Levitan explained the basic operation of cell phones and how cell phones accessed cellular service through a network of towers. (App. at 60-62). Levitan explained how and why cell phones always connect to their service provider's nearest tower and that service areas for towers are mutually exclusive. (App. at 56, 62 and 80). The murder scene and the Applicant's home are in different cell tower coverage areas and that service for those areas are mutually exclusive. (App. at 56, 62 and 80). Identifying 25,958 text messages Levitan testified that the Applicant was an obsessive cell phone user. (App. at 88, 95 and 97). Records for the day of the murders were consistent with Applicant's overall obsessive phone usage showing a high volume of calls and texts. This included a series of calls or texts made or received within just minutes of the murders. (App. at 92-93; App. at 419-427). All of these calls and texts, including those within just a few minutes of the murder connected through the tower servicing the Applicant's home. (App. at 92-93; App. at 419-427). The records show that on the day of the murders the Applicant's cell phone never once connected to the tower servicing the scene of the murders. (App. at 93-94; App. at 419-427). Because the tower service areas are mutually exclusive Levitan concluded and opined that there was no evidence from cell phone records that the Applicant was at or even near the scene of the murders when the murders occurred, or at any time on the day of the murders (App. at 97; App. at 428-457). Levitan's testimony was based on the same records that were provided to defense counsel through pre-trial discovery.

Trial counsel also failed to file and serve a notice of alibi in the case. (App. at 304). Applicant's mother Patricia Fuller and his father Donald Johnson both testified that the Applicant was home on the morning of the murders. Fuller testified that she had to go through the Applicant's

room at 6:30 a.m. and again at 7:00 a.m. to get to the laundry room that morning and that when she did the Applicant was asleep on the couch. (App. at 118). She never saw the Applicant leave the house that day. (App. at 118-119). Applicant's trial counsel was aware of what Fuller's testimony would have been and although she was present at the trial, he did not call her as a witness. (App. at 122-123). Donald Johnson testified that he went through the Applicant's room between 9:30 a.m. to 9:45 a.m. that morning and that the Applicant was still asleep on the couch. (App. at 129). Trial counsel was aware of what Donald Johnson's testimony would be and although Donald Johnson was present at trial he was not called as a witness. (App. at 132-133). Donald Johnson testified that he was "shocked" when he and Ms. Fuller were not called as witnesses. (App. at 133). Trial counsel testified that he had met with Applicant's parents and was aware of what their testimony would be. (App. at 167). Trial counsel had discovery material showing that the time of death for both victims was approximately 10:00 a.m. (App. at 168-170; App. at 458-463).

Applicant's trial counsel testified that he had the cell phone records showing text messages to and from Applicant's phone, including texts at 9:37 a.m. and 9:39 a.m. and 10:16 a.m. on the morning of the murders. (App. at 176). Counsel also had the coroner's report and other discovery material that showed the time of deaths to be approximately 10:00 a.m. (App. at 169; App. at 458-461). Records provided to trial counsel through discovery showed the Applicant's phone was not at or near the murder scene when those texts were sent or received or at any time during the day of the murders. (App. at 175-176; App. at 376-427). Counsel also had phone records of Granados, who pled guilty for his role as the inside man at the murder scene who let the shooter into the Victim One's house by leaving a door unlocked. (App. at 177-178). Those records showed a stream

of calls and texts by Granados from victim's house up to 9:37 a.m. (App. at 177-178; App. at 376-379). Granados suddenly stopped sending texts and did not resume making calls or sending texts until 10:17a.m. (App. at 177-178; App. at 376-379). This left a conspicuous forty-minute gap in an otherwise constant stream of texts. (App. at 177-178; App. at 376-379). Trial Counsel admitted that Granados' phone records tended to establish the time of the murders, especially when combined with records from Emergency Response Services showing when they received and responded to a fire call at the murder scene. (App. at 178; App. at 462-463).

Applicant's trial counsel testified that he had the Applicant's phone records when preparing for trial. (App. at 178-179). Although he had never tried a case involving cell phone location data, he was aware that the phone records contained location data. (App. at 180, 208 and 229). Counsel testified that he and his staff looked at the phone records for location data but didn't understand how to interpret the information to use it at trial. (App. at 180). Despite knowing that the phone records contained location data Trial Counsel failed to obtain an expert to assist in the interpretation of the phone record data that he had or otherwise failed to educate himself so that he could make an informed decision as to the value of the location data to the Applicant's case. (App. at 180).

At the Post Convict Relief hearing, counsel admitted that location data could "possibly" have been significant to the defense of the case. (App. at 180). Trial Counsel's failure to obtain an expert and use the cell phone information that had been provided through discovery was compounded by the testimony of the investigating officer who testified that all the cell phone data had been analyzed and that it did not contain anything of value. (App. at 781). Although Trial Counsel testified that he was trying to minimize or mitigate the cell phone evidence as it might be

“hurtful” to the Applicant, he never tried to understand sufficiently the cell phone location data that he knew had been provided in the discovery material. He was therefore unaware of its exculpatory value, and as a result, could not possibly have made an informed decision as to its potential use. (App. at 230). Counsel’s failure to conduct an independent investigation of the facts and circumstances of the case constitutes a failure to provide reasonably effective assistance under prevailing professional norms. Applicant is therefore entitled to relief.

STANDARD OF REVIEW

“In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application.” Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). “The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Rule 71.1(e), SCRPC. “This [c]ourt gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.” Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). “Questions of law are reviewed *de novo*, and we will reverse the PCR court’s decision when it is controlled by an error of law.” *Id.*

DISCUSSION OF THE ISSUES

1. There is sufficient evidence supporting the PCR court’s ruling that trial Counsel was ineffective for failing to undertake reasonable efforts to understand and use cell phone location data that he was provided in discovery, along with other evidence that was available to support a defense of alibi and otherwise refute the State’s claim that the Respondent was present at the scene of the murders.

Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64

(2011). The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” Strickland v. Washington, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland: first, the Petitioner must prove that counsel’s performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (*quoting Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. “A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.” Strickland,

466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. Butler, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC.

Counsel had discovery material showing establishing the victim's time of death at 10:00 a.m. By 10:13 a.m. the fire that had been started inside the murder scene had grown sufficiently to be noticed by a passerby who called 911 at 10:13 am. The time of death as determined by the coroner was supported by the conspicuous cessation of cell phone usage by the Inside Man between 9:37 a.m. to 10:17 a.m. Appellant's cell phone records placed the Appellant at home at 8:52 a.m., 9:03 a.m., 9:14 a.m., 9:33 a.m., 9:56 a.m., 10:07 a.m., and 10:46 a.m. While it is only a fourteen-minute round trip from the Appellant's home to the murder scene, the shooter's account of the murder and subsequent staging of the scene to look like a meth lab explosion would have taken a considerable amount of time. If Appellant's was using his phone from home at the times reported in the cell phone records it would have been impossible for him to be with the shooter, leave his house, drive to a place down the street from the murder scene, park and walk to the scene, participate in the all of the events described by the shooter involved in the actual murders, then go about staging the scene to look like a meth lab explosion, roll up the victims in a rug, attempt and fail several times to light the victims on fire, then actually set something in the house on fire, walk back to the car and then drive back to his house, all within one of the gaps shown on his cell phone records and during the times that he was observed to be at home asleep by his parents. Clearly there was substantial evidence and possibly overwhelming evidence that was available to counsel to refute the allegations that he was with the shooter at the scene and participated in the murders.

Applicant's trial counsel had the Applicant's phone records when preparing for trial. Those records come with explanatory information from the service provider (App. at 424-426). Although

Counsel had never tried a case involving cell phone location data, he was aware that the phone records contained location data. Counsel testified that he and his staff looked at the phone records for location data but didn't understand how to interpret the information to use it at trial. Despite knowing that the phone records contained location data, counsel failed to obtain an expert to assist in the interpretation of the phone record data that he had or otherwise to educate himself so that he could make an informed decision as to the value of the location data to the Applicant's case. At the PCR hearing counsel admitted that location data could have been significant to the defense of the case.

Counsel's failure to obtain an expert and use the cell phone information that had been provided through discovery was compounded by the testimony of the investigating officer who testified at the criminal trial that all the cell phone data had been analyzed and that it did not contain anything of value. It is clear that Trial Counsel failed to adequately prepare for Applicant's trial or even understand the evidence. Although counsel testified that he was trying to minimize or mitigate the cell phone evidence as it might be "hurtful" to the Applicant, this would not be a valid basis not to properly examine and understand the cell phone location data. Unquestionably, there was substantial and possibly overwhelming exculpatory evidence in the cell phone records. Trial Counsel did not adequately evaluate the pros and cons of the admitting of cell phone location information into evidence because he did not understand it. While Trial Counsel seemed to sense some harm in the content of the Applicant's text messages, he failed to identify a single message that he felt might appear incriminating. Of course, if there was, the State would have introduced them in its case-in-chief so there was no valid reason not to make reasonable efforts to investigate the case and understand the records he had.

Trial Counsel did not make an informed decision as to the call records' potential use. Trial Counsel failed to conduct an independent investigation of the facts and circumstances of the case. All of this constitutes a failure to provide reasonably effective assistance under prevailing professional norms. There is evidence to support the PCR Court's finding that counsel's failure prejudiced Applicant's defense in the case. Applicant submits not only is there evidence, but there is clear, convincing, and overwhelming evidence to support the Court's finding.

This [c]ourt gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "In PCR actions, this Court will uphold the lower court's findings if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)." Milledge v. State, 811 S.E.2d 796, 422 S.C. 366 (S.C. 2018).

CONCLUSION

For the foregoing reasons, this Court should deny the State's Petition for Writ of Certiorari. Should this Court grant the petition, the Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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