

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal From Greenville County  
Larry R. Patterson, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

AUG 29 2013

**S.C. Supreme Court**

Opinion No. 2011-UP-091 (S. C. Ct. App. filed March 8, 2011)

THE STATE,

PETITIONER,

V.

ROBERT WATKINS,

RESPONDENT,

Appellate Case No. 2011-195272

\_\_\_\_\_  
SUPPLEMENTAL APPENDIX  
\_\_\_\_\_

DAVID ALEXANDER  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

William M. Blich, Jr.  
Assistant Attorney General  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211

Attorney for Respondent

Attorneys for Petitioner

INDEX

INDEX.....i  
ORDER OF DISMISSAL FILED (JANUARY 25, 2006).....1  
SUPREME COURT OPINION NO. 2008-MO-001, FILED JANUARY 14, 2008.....9

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Robert Max Watkins, )  
 S.C.D.C. No. 243803, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

2004-CP-23-7064

ORDER OF DISMISSAL

ENTERED COMPUTER

2005  
 JAN 25  
 A 11:30  
*AS*

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 22, 2004. The Respondent made its return on February 28, 2005. An evidentiary hearing into the matter was convened on April 8, 2005 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, James W. Bannister, Esquire. The Court had before it a copy of the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return to the same.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the Perry Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2002 term of the Greenville

1 *YAW*

County Grand Jury for armed robbery (2002-GS-23-1063, count 1) and possession of a weapon during the commission of a violent crime (2002-GS-23-1063, count 2). James W. Bannister, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty as indicted. On October 25, 2002, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of thirty (30) years for armed robbery and five (5) for the weapons charge.

A timely Notice of Appeal was filed on Applicant's behalf. Wanda P. Hagler, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the nature of an Anders<sup>1</sup> brief. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Watkins, Op. No. 2004-UP-406 (S.C. Ct. App. filed June 22, 2004).

#### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
  - a. "Fail to comply with SCRCrP Rule 5 alibi."
  - b. "Fail to articulate 4th Amendment claims."
  - c. Failed to object to "prosecution misconduct."
  - d. Failed to "request for a directed verdict of acquittal, and state authority and facts supporting motion."
  - e. Failed to "object to language in the indictment."
  - f. Failed to "object to state violating sequester."
  - g. "Assist[ed] the State in introducing inadmissible hearsay testimony into evidence."
  - h. Failed to object to "improper jury charge on circumstantial evidence."
  - i. Failed to object to "improper charge to jury."

The Applicant also filed an amendment on January 25, 2005, in which he expanded upon the issues raised in his PCR application.



<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCF).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Sanchez v. State, 351 S.C. 270, 274-75, 569 S.E.2d 363, 365 (2000). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80

ZAP

L. Ed. 2d 674 (1984)). Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (citations omitted); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

The Applicant testified he gave an alibi statement when he was arrested. The Applicant testified trial counsel failed to give proper notice that Patricia Owens would be used as a part of his alibi defense. The Applicant testified trial counsel failed to properly investigate his case or interview witnesses. The Applicant stated trial counsel did not challenge either the search warrant or the chain of custody. The Applicant stated trial counsel should have objected to both prosecutorial misconduct in the State's closing argument and the circumstantial evidence charge.

Trial counsel testified the Applicant had an alibi for the time the armed robbery occurred and that the State produced a statement from this witness to that effect. Trial counsel testified he sent a letter to the State in which he referred to this statement. Trial counsel testified he believed this letter was compliant with providing alibi notice under Rule 5 and that he did not anticipate the trial judge would not provide an alibi charge to the jury. Trial counsel also said the State was surprised when the trial judge deemed the notice insufficient.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. This Court finds trial counsel, in sending the alibi letter to the

YRP

State, believed it would satisfy as notice of alibi under Rule 5, SCRCrimP. This Court finds that belief was well founded because, in the letter, trial counsel referred to the witness's statement and the State clearly knew the time, place, and date mentioned in that statement. Regarding the search warrant issue, this Court notes a pre-trial suppression hearing was held on this issue and that trial counsel objected to the warrant both at the close of the State's case and in his motion for a new trial. (Trial transcript, p.323; p.422). The Applicant admitted this on cross-examination. This Court finds the Applicant failed to articulate why trial counsel should have objected to the chain of custody. Upon reviewing the trial transcript, this Court also finds there was no reason for trial counsel to object to either the circumstantial evidence charge to the jury or during the State's closing argument.

This Court also finds the Applicant has failed to prove the second prong of Strickland -- that he was prejudiced by trial counsel's performance. Assuming arguendo that trial counsel erred regarding the alibi issue, this Court finds the Applicant has failed to prove prejudice as testimony related to alibi was presented at trial. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

6

CONCLUSION

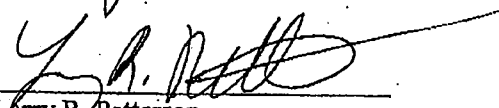
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

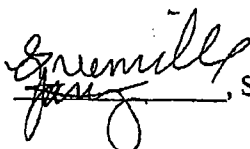
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17 day of January, 2006

  
\_\_\_\_\_  
Larry R. Patterson  
Resident Judge  
Thirteenth Judicial Circuit

  
\_\_\_\_\_, South Carolina.

STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

Robert Max Watkins, 243803  
 Plaintiff )

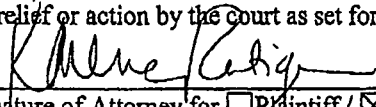
v. )

State Of South Carolina  
 Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO.  
2004-CP-23-7064

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: Rodney W. Richey, Esquire, Bar No. Address: Post Office Box 10916 Greenville SC 29603 phone: (864) 467-0503 fax: (864) 467-0646 e-mail: other:	Defendant's Attorney: Karen C. Ratigan, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	November 2, 2005 Date submitted
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT:	
(check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS  
ROBERT MAX WATKINS 243803

JUDGMENT IN A CIVIL CASE  
CASE NO. : 2004 CP 23 7064  
STATE

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other:
- ACTION STRICKEN (+CHECK REASON):  Rule 40(j) SCRPC;  Bankruptcy:
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other \_\_\_\_\_

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

CLERK OF COURT  
 STATE OF SOUTH CAROLINA  
 2006 JAN 25 A 11:30  
*(Signature)*

Dated at Greenville, South Carolina, this \_\_\_\_\_ day of \_\_\_\_\_, 2005

Court Reporter: \_\_\_\_\_

PRESIDING JUDGE - \_\_\_\_\_

This judgment was entered on the 25 day of 1 2006 and a copy mailed first class this 25 day of 1 2006 to attorneys of record or to parties (when appearing pro se) as follows:

RODNEY RICHEY

KAREN RATIGAN

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

Robert M. Watkins, Petitioner,

v.

State of South Carolina, Respondent.

---

ON WRIT OF CERTIORARI

---

Appeal from Greenville County  
Victor Pyle, Jr., Circuit Court Judge  
Larry R. Patterson, Post Conviction Relief Judge

---

Memorandum Opinion No. 2008-MO-001  
Submitted November 15, 2007 – Filed January 14, 2008

---

**REVERSED**

---

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General, Salley W. Elliott, Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

---

**PER CURIAM:** In this case, we granted certiorari to review the denial of Petitioner Robert M.

Watkins' application for post-conviction relief (PCR). We reverse the PCR court's order denying relief.

The State alleged that Petitioner robbed a Chuck-E-Cheese restaurant at approximately 1:00 a.m. At trial, Elena Pelzer, Petitioner's girlfriend, testified that on the night of the robbery, Petitioner left their apartment at 9:30 p.m. and returned at approximately 12:50 a.m. Pelzer testified that shortly thereafter, they left the apartment to get food, but were stopped by police and arrested for the robbery. During the jury charge conference, trial counsel requested an alibi instruction, but the trial court refused based on trial counsel's failure to comply with Rule 5 (e), SCRCrimP.<sup>[1]</sup> The jury found Petitioner guilty, and the court of appeals dismissed Petitioner's direct appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). *State v. Watkins*, Op. No. 2004-UP-406 (S.C. Ct. App. filed June 22, 2004).

Petitioner filed an application for PCR in which he alleged trial counsel was ineffective for failing to obtain an alibi instruction. At the PCR hearing, trial counsel testified that he believed the letter to the solicitor's office complied with Rule 5(e)'s notice requirements. The PCR court found trial counsel was not ineffective because his belief that he complied with the rule was "well founded" and dismissed Petitioner's PCR application. Petitioner argues to this Court that the PCR court erred in ruling trial counsel was not ineffective. We agree.

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

Because Pelzer's testimony showed that Petitioner was at a different place at the time of the robbery, he was entitled to an alibi charge. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) (holding that if there is any evidence to support a charge, the trial court should grant the request). Thus, trial counsel was deficient for failing to raise this argument to the trial court and obtaining an alibi instruction. See *Ford v. State*, 314 S.C. 245, 442 S.E.2d 604 (1994) (holding that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness). Moreover, Petitioner was prejudiced by the trial court's failure to give an alibi instruction because there is a reasonable probability that the result of trial would have been different, as the State based its case against Petitioner entirely on circumstantial evidence. See *Riddle v. State*, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992) (holding that the failure to give an alibi charge, where the defendant claims to be at another place, is reversible error); *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (noting that an alibi charge is considered especially crucial when the evidence is entirely circumstantial).

Accordingly, we hold that trial counsel was ineffective and grant Petitioner relief.

**TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.**

---

[1] Rule 5(e)(1), SCRCrimP, provides:

Upon written request of the prosecution stating the time, date and place at which

the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

The trial court denied trial counsel's request for an alibi instruction because, although the notice stated that Pelzer would provide an alibi defense, it did not state the specific place that Petitioner claimed to have been at the time of the robbery.