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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2024-000149

Antonio Jordan, #292329,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUES ON APPEAL

Whether Counsel's performance was constitutionally deficient for failing to investigate and produce Petitioner's brother as an additional alibi witness where Counsel acknowledged the only defense was alibi, and that he would have called additional alibi witnesses had he known of them to bolster and support the trial testimony of the other two alibi witnesses?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

Did the PCR court properly find Counsel was not ineffective for failing to call Petitioner's brother as an alibi witness, where Counsel testified Petitioner's brother spoke with Counsel frequently but never indicated that he could support Petitioner's alibi, the PCR court determined Counsel's testimony on this point was credible and the brother's testimony was not, and the "alibi" provided by Petitioner's brother at the PCR hearing was inconsistent with the alibi evidence presented at Petitioner's trial?

STATEMENT OF THE CASE

On November 8, 2013, Derek Clark ("Victim") left his home between approximately 9:00 a.m. and 1:30 p.m.; when he returned home, he discovered his house had been broken into. (App.pp.120–22). Victim retrieved a firearm from his truck and proceeded through his residence, but did not locate anyone inside. (App.p.121). Victim noticed the back door was open and the glass had been broken. (App.p.121). Victim's entire house had been ransacked, and he called police. (App.p.121). Victim discovered four of his firearms were missing. (App.p.122). Investigators used a K-9 unit to follow the burglar's trail from Victim's house through the nearby woods, finding numerous scattered items that were later identified as having been taken from Victim's house, including Victim's voter registration card. (App.pp.129–34; pp.144–55). The K-9 unit also found a black skull cap along the trail. (App.p.148).

On November 14, 2013, Petitioner was pulled over while riding a moped after he drove through a stop sign. (App.p.44). Officer Travis Shealy moved the moped farther to the side of the road in order to safely inspect the VIN number. (App.p.217). After he did so, he noticed a firearm lying on the ground where the moped had been. (App.p.217). The officer inferred the gun was dropped by Petitioner because it appeared to be "fresh" and dry despite there being snow on the ground. (App.p.45; pp.217–18). At that point, Petitioner was placed under arrest, and subsequent investigation revealed the serial number on the gun matched one of the guns stolen during the burglary at Victim's residence. (App.p.45; pp.205–06).

A buccal swab was taken from Petitioner, and that DNA was compared to DNA found on the black skull cap discovered by the K-9 unit at the scene of the burglary. (App.pp.232–35). The DNA obtained from the cap was consistent with a mixture of at least two individuals, and the major DNA profile was consistent with Petitioner's DNA profile. (App.pp.234–35). The probability of

randomly selecting an unrelated individual with a matching DNA profile was determined to be anywhere from one in 190 quintillion to one in 8.8 sextillion. (App.p.235).

In December 2014, the York County Grand Jury indicted Petitioner for possession of a handgun by a person convicted of a crime of violence (2014-GS-46-3735) and possession of a stolen handgun (2014-GS-46-3777). In January 2015, the York County Grand Jury also indicted Petitioner for first-degree burglary (2015-GS-46-1543), and possession of a firearm by a person convicted of a violent offense (2015-GS-46-00064).

On January 26, 2015, Petitioner appeared before the Honorable Roger L. Couch and pled guilty to all of the charges as indicted except for the first-degree burglary. Petitioner entered a plea of not guilty and proceeded to a jury trial solely on the first-degree burglary charge. David C. Cook, Esquire ("Counsel"), represented Petitioner. Assistant Solicitors Christopher Epting and Ryan Newkirk of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On January 26, 2015, Judge Couch proceeded with Petitioner's guilty plea hearings on the three gun charges. At the conclusion of the plea hearing, Judge Couch sentenced Petitioner to three years on each charge to run concurrently. Petitioner was also given credit for 438 days.

On January 28, 2015, the jury found Petitioner guilty of first-degree burglary. Following the verdict, Judge Couch sentenced Petitioner to imprisonment for twenty-five years with credit for 440 days. Judge Couch ran this sentence concurrent to the sentences imposed on Petitioner on January 26, 2015.

Petitioner filed a timely notice of appeal. Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense perfected Petitioner's appeal solely on the first-degree burglary charge. Ms. Hackett submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). She also petitioned the court to be relieved as counsel. The South Court of Appeals

dismissed the appeal and granted appellate counsel's motion to be relieved. The remittitur was issued on January 17, 2018.

Petitioner filed an application for post-conviction relief ("PCR") on April 8, 2019, raising a single allegation of "ineffective assistance of counsel" without additional detail. Respondent moved to dismiss the application as untimely. Following a hearing on August 12, 2019, the Honorable Roger E. Henderson found that Petitioner's delay in filing the application was due to extraordinary circumstances outside his control and directed that an evidentiary hearing be held on the merits of Petitioner's allegations.

Petitioner filed an amended application on August 3, 2020, raising the following grounds for relief:

1. Trial Counsel told Petitioner that, if Petitioner pled to the gun charges, then his plea could not be used against him in his trial on the burglary charge. Petitioner was also informed that the burglary charge would be nolle prossed if he accepted the plea to the gun charges.
2. Trial Counsel was unprepared for trial and appeared to have no theory of defense.
3. Trial Counsel was ineffective for advising Petitioner not to testify.
4. Trial Counsel failed to retain a DNA expert and appeared not to understand the DNA evidence.
5. Petitioner believed he had accepted a plea offer for a negotiated sentence of seven years, but he was later told the offer was withdrawn due to an unexplained error.
6. Trial Counsel failed to investigate and present potential alibi defenses.

An evidentiary hearing was held before the Honorable Walton J. McLeod, IV, on December 8, 2022, at the Moss Justice Center in York, South Carolina. Following the hearing, Judge McLeod issued an order denying and dismissing the PCR application with prejudice. Petitioner filed his petition for a writ of certiorari with this Court on June 10, 2024.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts must be especially deferent to the credibility findings of the post-conviction relief court. *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018); *see also Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses.").

ARGUMENT

The PCR court properly found Counsel was not ineffective for failing to call Petitioner's brother as an alibi witness, where Counsel testified Petitioner's brother spoke with Counsel frequently but never indicated that he could support Petitioner's alibi, the PCR court determined Counsel's testimony on this point was credible and the brother's testimony was not, and the "alibi" provided by Petitioner's brother at the PCR hearing was inconsistent with the alibi evidence presented at Petitioner's trial.

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 applicant 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), SCRCP.

Counsel has a duty to contact alibi witnesses identified by a defendant in order to ascertain whether their testimony would aid the defense. *Walker v. State*, 407 S.E.2d 400, 405, 756 S.E.2d 144, 147 (2014). However, to prove prejudice from Counsel's failure to interview or call a defense witness, a PCR applicant must present the testimony of that witness and show that it would have benefited him at trial. *See, e.g.*, *Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80 (2019) (holding a PCR applicant who claims trial counsel was ineffective for failing to call certain witnesses must produce those witnesses or their testimony at the PCR hearing); *Taylor v. State*, 258 S.C. 369, 378, 188 S.E.2d 850, 854 (1972) (holding a PCR applicant's allegation that his trial counsel failed to adequately investigate his case was unsupported where the applicant failed to point out any substantially beneficial evidence which could have been discovered by further investigation).

The only issue raised by Petitioner's petition for a writ of certiorari is whether the PCR court erred in finding Counsel was not ineffective for failing to call Petitioner's brother, Neil Jordan, as an additional alibi witness at trial. Petitioner contends Counsel's failure to investigate

Neil as a potential alibi witness was unreasonable because Petitioner's only defense was alibi and Counsel should have realized that Neil might have been able to present alibi testimony. Petitioner also argues Counsel's failure to call Neil prejudiced Petitioner because Neil's testimony would have corroborated the testimony of Petitioner's other alibi witnesses. These arguments are meritless.

Counsel testified that Neil never indicated to him that he could provide an alibi for Petitioner, even though Neil had Counsel's cell phone number and would call him frequently to discuss the case. (App.p.394, lines 4–20; p.431). Counsel testified that, if he had known Neil could corroborate Petitioner's alibi, he would have called him at trial along with the two alibi witnesses who did testify; however, neither Petitioner nor anyone else ever indicated that Neil was a potential alibi witness. (App.p.394, lines 18–21; p.404, line 21–p.405, line 1). The PCR court found Counsel's testimony on this point credible. (App.pp.445–46). Petitioner argues that Neil's PCR testimony indicated that "he spoke with Counsel about being an alibi witness and was willing to testify;" however, the PCR court found Neil's testimony not credible. (App.pp.445–46). This Court, which is not in a position to observe the witnesses, should respect the credibility findings of the PCR court on this issue. *Frierson*, 423 S.C. at 262, 815 S.E.2d at 435. Counsel's credible testimony established that, despite speaking with Neil many times about the case, Neil never claimed to be an alibi witness and was never "identified" as an alibi witness by Petitioner or by anyone else; therefore, Counsel was not deficient for failing to further investigate Neil as a witness. *See Walker*, 407 S.E.2d at 405, 756 S.E.2d at 147 (holding counsel has a duty "to investigate alibi witnesses *identified by a defendant*") (emphasis added).

Petitioner nevertheless insists that Counsel should have guessed that Neil was a potential alibi witness based on the testimony of Petitioner's mother that her husband and her "other son"

named "Brandon" were with Petitioner on the morning of the crime. (App.p.275). In a footnote, Petitioner suggests that "Brandon" and Neil could have been the same person, since there was no other indication that Petitioner's mother had more than two sons and Neil's middle name does not appear in the record. However, since this is a PCR case, Petitioner bears the burden of proving his factual allegations. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The mere fact that the record is silent as to the number and names of all Petitioner's brothers does not mean this Court can simply assume that Neil and Brandon are one and the same. Still less should *Counsel* be expected to rely on such an assumption when preparing for trial, *particularly* where Neil never mentioned being with Petitioner at the time of the crime in any of his numerous conversations with Counsel about the case.

Most importantly, however, the "alibi" presented by Neil at the PCR hearing was inconsistent with the testimony of the two alibi witnesses who actually testified at trial: Petitioner's mother and girlfriend. At trial, Petitioner's mother testified that she left home with Petitioner to work at their family-owned store at 8:30 that morning; because work was slow, she left with Petitioner between 10:30 and 11:00 and dropped him off at his girlfriend's house. (App.pp.273–74). Petitioner's girlfriend testified she got a call from Petitioner at 10:45 that morning saying he was at his mother's house. (App.p.282). Petitioner came to her house at 11:15, and they stayed together until 3:15 p.m. when Petitioner's girlfriend had to leave for her job. (App.p.282). However, Neil—who was not mentioned by either Petitioner's mother or his girlfriend—testified he picked Petitioner up at 8:45 a.m. and dropped him off at his girlfriend's house at 5:00 p.m. (App.p.428). Neil did not explain what he and Petitioner were doing or where they were during that time. The PCR court correctly found Neil's testimony was not consistent with the alibi

testimony presented at Petitioner's trial. Therefore, the PCR court found Petitioner had not met his burden of proving he was prejudiced by Counsel's failure to call Neil as a witness.

Petitioner admits that Neil's "statements of time and location were not perfectly in sync with those of Mother and Girlfriend." He complains, however, that "perfect recollection cannot be expected after the passage of nearly a decade." Once again, it must be remembered that *Petitioner* bears the burden of proof in this case. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Mere speculation as to what a witness's testimony might have been cannot satisfy Petitioner's burden of showing prejudice. *Martin*, 427 S.C. at 455, 832 S.E.2d at 280. The PCR court's findings on this issue are clearly supported by the evidence in the record, and its ruling should not be disturbed based on mere speculation that Neil might have given *different* testimony at trial than he gave at the evidentiary hearing.

Next, Petitioner argues that, even if Neil had given testimony that was inconsistent with the other alibi testimony presented at trial, at least it would have given jurors the "option to believe his testimony" if they deemed Petitioner's mother and girlfriend not credible. Therefore, Petitioner argues Neil's testimony was necessary to "buttress Petitioner's alibi defense." This contention is absurd. Neil's testimony *contradicted* the timeline given by Petitioner's mother and girlfriend. Presenting it would have destroyed—not "buttressed"—the credibility of Petitioner's alibi.

Counsel presented two witnesses to account for Petitioner's whereabouts at the time the crime occurred. Their testimony, for the most part, was mutually consistent as to time and place, and the timeline they gave together covered the time of the burglary. To then present a *third* witness, whose testimony was *contrary* to that of the other two witnesses, would have torpedoed Petitioner's alibi in the eyes of the jury. Counsel cannot have been deficient, nor can Petitioner have been prejudiced, by failing to pursue such a suicidal strategy.

One more point bears mentioning. Throughout the petition, Petitioner makes much of Counsel's statement that the alibi defense was "the only defense [he] had." (App.p.431). However, from the totality of Counsel's testimony during the evidentiary hearing, it is clear that Counsel had prepared to present a sophisticated defense at Petitioner's trial comprising three separate attacks on the State's case. First, to explain how Petitioner came to be in possession of the gun that was stolen during the burglary, Counsel planned to elicit from Petitioner that he had bought the gun from a friend without knowing it was stolen. (App.p.384, line 17–p.385, line 20; p.391, lines 1–11; p.399, lines 11–19). Second, to explain the presence of Petitioner's DNA on the cap recovered from the burglary scene, Counsel planned to elicit from Petitioner that the cap must have been worn by somebody else who had gotten it from Petitioner prior to the burglary, which would have been consistent with the State's DNA evidence since there was a second contributor. (App.p.389, lines 5–12; p.400, lines 2–9). The alibi was the third prong of Counsel's defense strategy. The testimony of the alibi witnesses was only needed for the third prong; the other two prongs were supposed to be established by Petitioner's testimony. However, Petitioner spoiled the plan in the middle of trial by suddenly changing his mind and refusing to testify. (App.p.391, lines 14–20; p.393, lines 10–12; p.399, line 20–p.400, line 2; p.402, lines 6–12). The PCR court found credible Counsel's explanation that Petitioner's testimony about buying the gun from a third party was part of the initial trial strategy, which Petitioner frustrated by changing his mind mid-trial. (App.pp.443–44). Since Petitioner refused to provide the necessary testimony to establish an innocent explanation for his possession of the stolen gun and the presence of his DNA on the cap, Counsel was unexpectedly left in the middle of trial with Petitioner's alibi as the "only defense [he] had." (App.p.431). It is disingenuous for Petitioner now to seize on this out-of-

context remark and criticize Counsel for allegedly neglecting his "only defense," when in fact the *other* two legs of Counsel's defense strategy were undermined by Petitioner's own conduct.

The PCR court correctly found Petitioner failed to establish either deficiency or prejudice as required by *Strickland*. Because Petitioner has not established any error in the decision of the PCR court, the State asks this Court to deny the petition for a writ of certiorari.

CONCLUSION

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

Respectfully submitted,

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