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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable B. Alex Hyman, Circuit Court Judge

DESHANNDON M. FRANKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000927

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding counsel was not ineffective where he waived an objection to the reliability of Petitioner's cell phone location information used to defeat his alibi?

STATEMENT

The state indicted DeShanndon Franks with two counts of murder and one count of possession of a weapon during the commission of a violent crime. App. 543-51. He went to trial in August of 2016 before Judge Frank Addy where he was represented by J. Falker Wilkes. App. 1. Warren Mowry and Lance Sheek prosecuted the case for the state. App. 1.

Shortly after midnight on January 31, 2014, DeShanndon Franks, Tevin Hill, Tamia Kinard, and Sammie Darryl Leake were all at the mobile home of Nikesha James. App. 618. Around 1:00 in the morning, Kinard asked Hill for a ride home, and the two left. App. 262:25-263:14, 515, 541. As Hill wrote in his statement to police the very next day, Petitioner then called Hill and asked if he would drive Petitioner up to Greenville. App. 275:9-276:1, 515. Hill then returned to Kinard's house, picked Petitioner up outside, and they drove to his cousin's house in Fountain Inn where they stayed the night. App. 276:8-16, 515. The next morning Atrayel Williams and Laquesha Cureton found James and Leake dead in James's home. App. 144:22-146:20.

Hill was also charged with the murders, and those charges were still pending at the time he testified against Petitioner. App. 279:12-19. In exchange for testifying, the state agreed to dismiss the charges. App. 279:20-25. On the stand, Hill recanted his prior statement and testified he initially lied to the police at the request of Petitioner. App. 274:14-275:7. He testified instead that he did not return to Kinard's house but rather went to his grandmother's home nearby. App. 264:9-15. Hill testified that he was at his grandmother's house when Petitioner called him several hours later and asked to drive him to Greenville. App. 266:13-17. At trial, Hill stated Petitioner was near James's home walking outside and told him "stuff went bad" before the two drove away. App. 266:19-267:7.

The state placed the time of the murders around 3:00 a.m. when Milton Grant, James's neighbor, heard gunshots. App. 250:3-4. It used Petitioner's call records and location information to purportedly demonstrate he was at the scene of the crime and did not drive to Greenville or Fountain Inn until after the time of the murders. App. 455:2-6. Sergeant Dan Kelley of the Greenville County Sheriff's Office testified as an expert in "GeoTime software and call record translation tools." App. 401:24-402:1, 412:18-22. Based on records from Verizon, he testified that at 2:53 a.m. Petitioner was on John Grant's Street, where the victim lived. App. 271:10-17, 419:11-424:5. Trial counsel argued Kelley was not qualified to testify about the reliability of Verizon's data, but because he did not object to the admission of the data itself, Kelley was allowed to use the data without demonstrating its reliability. App. 411:2-414:24.

The jury began deliberating at 3:05 p.m. App. 492:4-5. During deliberation, the jury requested to hear again Hill's testimony regarding his first statement to police and to read the statement itself. App. 492:24-493:19. The jury deliberated until 8:08 p.m., was unable to reach a verdict, and requested they continue deliberations in the morning. App. 495:1-6. It continued deliberating just after 9:00 a.m., re-heard more testimony, and finished deliberating after noon. App. 497:16-498:22. It ultimately found Petitioner guilty on all charges. App. 499:12-22. Judge Addy sentenced him to forty-five years in prison. App. 508:8-14. The court of appeals affirmed the convictions. *State v. Franks*, 432 S.C. 58, 64, 849 S.E.2d 580, 583 (Ct. App. 2020).

Petitioner filed an application for PCR on February 22, 2022. App. 553. Represented by Ashley McMahan, he filed an amended application on November 15, 2023. Judge Alex Hyman held a hearing on the application on November 28, and Cruise Mitchell represented the state. App. 580. The PCR court entered an order denying the application on May 31, 2024. App. 616.

It believed counsel presented an adequate strategic reason for not objecting to the reliability of the data and that, in any event, the admission of the data was not prejudicial. App. 625-26.

This petition for a writ of certiorari follows.

ARGUMENT

"The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel." *Stone v. State*, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) (citations omitted). A PCR applicant proves ineffectiveness in two prongs: "(1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005)).

Whether trial counsel was so ineffective as to deprive petitioner of his Sixth Amendment right to counsel is a question of law that this Court reviews de novo. *Cf. State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (stating appellate courts review with deference findings of fact but de novo whether those facts legally constitute waiver of right to counsel); *State v. Frasier*, 437 S.C. 625, 632-34, 879 S.E.2d 762, 765-66 (2022) (holding whether given facts constitute a violation of the Fourth Amendment is a question of law); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (holding whether a statement was voluntarily made to police is a question of law).

Trial Counsel was Ineffective by Failing to Object to the Reliability and Authentication of the Verizon Phone Records

At trial, counsel did not object to the admission of State's Exhibit 34—Verizon's records that included cell site location information—on the basis the information was unreliable. App. 58:6-24, 352:13-25. However, when the state later attempted to qualify Sergeant Kelley as an expert, trial counsel objected to his use of the Verizon data because Kelley could not testify to its reliability. App. 405:17-19, 411:2-22. The state argued that he was required to raise that objection when the data itself was introduced. App. 412:7-9. The trial court and court of appeals

agreed with the state. App. 413:21-414:24; *State v. Franks*, 432 S.C. 58, 76-77, 849 S.E.2d 580, 590 (Ct. App. 2020) ("Because the underlying data—the Verizon records—had already been admitted into evidence when the State offered Sergeant Kelley as an expert, Franks waived his challenge to the reliability of the data by failing to object at the time the State introduced the data."). Thus, trial counsel failed to preserve his objection to the reliability of the underlying information. *Franks*, 432 S.C. at 77, 849 S.E.2d at 590. Had counsel objected, Kelley would have had no basis for his opinion of Petitioner's location and his testimony would have been excluded. *See State v. Galloway*, 443 S.C. 229, 238, 904 S.E.2d 866, 871 (2024) ("[The] trial court 'must assess not only (1) whether the expert's *method* is reliable . . ., but also (2) whether the *substance* of the expert's testimony is reliable.'" (quoting *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365 (Ct. App. 2020), *aff'd*, 436 S.C. 395, 872 S.E.2d 638 (2022))); *see also* 22 Corpus Juris, *Evidence* § 821, at 727 (1920) ("The judgement of an expert is of value precisely in accordance with what there is back of it.").

Trial counsel knew he needed to object to the use of this data because it was a key part of the state's evidence to defeat Petitioner's alibi defense—that is why he challenged its use by Kelley. At the PCR hearing, counsel testified he did not object to the evidence itself for two reasons. App. 601:6-603:12. First, he believed the evidence would have been admissible under the hearsay exception in Rule 803(6), SCRE as a "regularly conducted activity." Second, he expected that, had he objected, the state would have called someone from Verizon and that person would have been more credible than Kelley, thus leaving him without room to create doubt about the reliability of the data.

These were not "sound" reasons. *Stone v. State*, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) ("[C]ounsel's decision to employ a certain strategy will be deemed unreasonable under the

Sixth Amendment if the reasons given for the strategy are not sound."). On the first point, counsel's testimony that the evidence was admissible under Rule 803 was based on a misunderstanding of the objection he ought to have raised. While that exception could have defeated a hearsay objection, it has nothing to do with the reliability and accuracy of the data. The proper objection would have been to the foundation or authentication of the information. The state claimed the data was compiled by Verizon and accurately reflected the location of Petitioner's phone around the time of the murders. App. 421:17-424:5. It needed evidence sufficient to establish the data was "what its proponent claims." Rule 901(a), SCRE. Kelley was not qualified to confirm the accuracy of the information, as he had no personal knowledge of the systems that produced the data. App. 408:1-7. When asked how he knew if the data was accurate, Kelley clearly testified he did not: "It's up to the phone company. They're the ones that -- the engineers can testify to that." App. 408:6-7. Without someone from Verizon, there was no evidence "showing that the process or system produces an accurate result." Rule 901(b)(9), SCRE. The evidence, and therefore Kelley's opinion, should therefore have been excluded as the data could not be authenticated as an accurate estimate of the location of Petitioner's phone.[1]

Counsel's second point—that the state would have called a Verizon representative instead—is preposterous. The state made its witness list Court's Exhibit 7, and that list demonstrates it never intended to call a Verizon witness. All of the people identified on that list actually testified at the trial except for Mike Rainey, an investigator with the Greenville County Sheriff's Office. App. 2-5, 87:17-20, 533. There was no Verizon expert available because the

[1] The notations within some of Verizon's records describing the "confidence" in its location estimation, App. 419:21-420:15, was not sufficient to authenticate the data because that was hearsay. Even if the records themselves are business records, the affirmative statements within them are still hearsay within hearsay, and a Verizon representative was necessary to esstablish those conclusions as true.

state was never going to find one in the middle of trial. Because counsel knew the witnesses the state intended to call, he should have known they would have been unable to fill this gap in information. His fear that it would have produced a Verizon expert was therefore not a reasonable basis for deciding not to object. Had counsel objected to this evidence properly, the state would not have been able to establish the reliability and authenticity of the data.

Moreover, trial counsel's conduct in contesting Kelley's expertise belies his claimed explanation. Counsel testified he did not want a Verizon expert testifying about the reliability of the data, yet he nonetheless challenged Kelley's ability to testify about the reliability. That decision necessarily assumed the state would not be able to call someone from Verizon to fill any evidentiary gap he poked in the testimony. Counsel's stated strategy expressly contradicts his conduct, and such contradictory paths cannot be deemed reasonable. Thus, the PCR court erred in finding trial counsel was not deficient.

The PCR Court also erred in concluding any prejudice to Petitioner was insubstantial. Relying on a footnote in the court of appeals opinion, the PCR court found Petitioner did not demonstrate prejudice because the evidence "was not used to place him at the crime scene but to show he never travelled to Greenville after he left James's residence." App. 626. This conclusion is not supported by the record. First, the state itself in closing arguments recognized Hill's initial statement, if believed, established Petitioner's alibi. App. 453:3-6. Second, Kelley expressly asserted Petitioner was on John Grant Street—where the victim's home was—just before 3:00 a.m. App. 271:10-17, 421:21-422:19, 423:14-18. State's Exhibit 25 was a screenshot produced by Kelley placing Petitioner's phone on John Grant Street at 2:53 a.m. App. 422:14-19; State's Ex. 25. The PCR court's reason for finding Petitioner was not prejudiced by any deficiency is therefore entirely unsupported by the record.

Further, the phone location evidence was critical to defeating Petitioner's alibi defense based on Hill's initial statement to law enforcement. Hill's original statement was that after he drove Tamia Kinard home around 1:00 a.m., he turned around and picked up Petitioner outside the victim's home and drove to Fountain Inn where they spent the night with his cousin. That statement plainly put Petitioner outside of the city at the time of the murders. But for the cell phone data, the entire case thus boiled down to whether the jury believed Hill's first statement or his testimony at trial. Hill's credibility was therefore paramount. Yet his credibility was inherently doubtful because he was there to testify so the state would drop *murder* charges against him. The state recognized this fact in closing: "H[ill] got charged too. Is he in here lying trying to save his own neck? And that's a question you should ask yourselves." App. 453:21-23. To ensure the jury found him credible, however, the solicitor used the phone data to support his second version of events: "So when you're testing that, Tevin Hill's story, you look at the map of this phone." App. 455:2-6.

Finally, the PCR court's summary statement that the trial court did not abuse its discretion in allowing Kelley's testimony is mistaken. Relying on the court of appeals opinion, it concluded the testimony would have come in regardless of an earlier objection. But this is not true because the comment in the court of appeals opinion presupposed the reliability of the data. *See Franks*, 432 S.C. at 77, 849 S.E.2d at 590 ("Sergeant Kelley testified it was Verizon's best estimate of where the handset was at the time."). Kelley should never have been allowed to opine the data reliably established Petitioner's location because, as he admitted, that was a matter about which Verizon's engineers needed to testify. App. 408:6-7. Counsel's failure to properly object was therefore prejudicial.

422:14-19; State's Ex. 25. The PCR court's reason for finding Petitioner was not prejudiced by any deficiency is therefore entirely unsupported by the record.

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Verizon's engineers needed to testify. App. 408:6-7. Counsel's failure to properly object was therefore prejudicial.

CONCLUSION

Petitioner respectfully requests this Court grant his petition for a writ of certiorari and permit full briefing on this issue. By failing to properly object to the reliability of the Verizon evidence, trial counsel was deficient because his claimed strategy was unreasonable as a matter of law. Because that evidence was critical to supporting Hill's testimony that defeated Petitioner's alibi, he was prejudiced. Had the proper objection been made, there is a reasonable probability the result of the proceeding would have been different.

Jordan Wayburn
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 2024.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 9th day of December, 2024.