STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

THOMAS BROOKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel's error in allowing petitioner to plead guilty to robbery because his alibi defense was not "rock solid" suggested that counsel mistakenly believed that petitioner had the burden of proving alibi when it was the state's burden to prove that petitioner was present at the crime scene and that he participated in the crime.

STATEMENT

Petitioner Thomas Brooks pled guilty to robbery[1] per North Carolina v. Alford[2] during the September 2010 term of the Richland County General Sessions Court before Judge R. Lawton McIntosh. Petitioner was sentenced to imprisonment for a period of twelve years, suspended upon the service of seven years and three years probation. App. 1-19. Rhodes Bailey represented petitioner at the plea proceeding. Petitioner did not enjoy the benefit of a direct appeal in the case.

Petitioner filed a PCR application and an amended PCR application on September 23, 2011, on January 7, 2013, respectively, with the Richland County Office of the Clerk of Court. App. 21-36; App. 66-72. The respondent filed a return requesting that a hearing should be held in response to petitioner's PCR action filed with the Clerk of Court. App. 45-50.

A PCR hearing was held in the case on September 14, 2012, at the Richland County Courthouse before Judge J. Ernest Kinard. Petitioner was present at the hearing and represented by Robert T. Strickland. App. 73 – 211.

On December 31, 2012, Judge Kinard issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 228-246.

On January 17, 2013, petitioner filed a motion per Rule 59(e), SCRCP, in the case. App. 247-253. Judge Kinard denied the Rule 59(e), SCRCP, motion. App. 235 – 256. Petitioner appealed Judge Kinard's orders. This petition for writ of certiorari follows.

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[1] Petitioner was indicted originally for armed robbery. App. p. 257 – 258.
[2] North Carolina v. Alford, 400 U.S. 91 (1970)

ARGUMENT

Trial counsel's error in allowing petitioner to plead guilty to robbery because his alibi defense was not "rock-solid" suggested that counsel mistakenly believed that petitioner had the burden of proving alibi when it was the state's burden to prove that petitioner was present at the crime scene and that he participated in the crime.

During the plea proceeding, the solicitor apprised the plea judge of the facts in the case. On the night of February 5, 2009, James League was employed at Pops Pizza in Five Points in Columbia and had driven to Maple Street in the Millwood Drive area of Columbia to deliver a pizza order that had been called in previously. When League arrived at the delivery location, a man approached, presented a pistol, and ordered him to "give [him the money]." App. 10, l. 1-24. League surrendered $37.00 and fled. Then, League reported the incident to police and described the perpetrator as a black male who stood six feet and two or three inches tall and wore a black hoodie and dark pants. Approximately ten minutes later, police were patrolling the area where the robbery took place and saw a person who fit the description of the male robbery suspect engaged in a fight with Terrance Thompson at Suds Laundromat located near Millwood Avenue. Petitioner was arrested shortly thereafter and subsequently identified by League as the robbery during a show-up procedure that occurred while petitioner was in police custody. App. 10, l. 25 – p. 12, l. 9.

During the PCR hearing, PCR counsel argued in effect that trial counsel did not develop the alibi defense in the case because petitioner was present at the Laundromat fighting when the pizza robbery in question occurred. App. 81, l. 1 – p. 82, l. 25. PCR counsel presented evidence establishing that the actual robbery occurred at 10:45 or 10:46 pm on the night in question and the 911 call made reporting the pizza robbery came in at 10:56 pm on that night. App. 82, lines 5-8; App. 105, l. 21 – p. 107, l. 10; App. 111, l. 11 – p. 112, l. 24. The EMS and 911 reports that came

through to report the Laundromat fight came in shortly before the 11:00 call pm on that night. App.94, lines 14-17; App 119, lines 8-14; App. 134, lines 1-4. Note that the PCR evidence revealed that it would take ten-to-fifteen minutes to walk from the location where the robbery occurred to the Suds Laundromat, which was one-half of a mile, to where the fight occurred. App. 205, lines 16-17.

Trial counsel testified during the PCR hearing and stated that he did not believe that petitioner's alibi defense was strong. App 93, lines 18-25. Counsel stated that there was a show up identification made in the case and that the laundromat was close to where the robbery took place so it was conceivable that petitioner "could have been at [the laundromat] and been in a fight and also committed this robbery." App 94, l. 5 – p. 95, l. 20. Counsel explained that he did not discourage petitioner from exercising his right to a trial by jury, but that he pointed out the "potential holes or questions in the alibi" because the alibi was not "rock-solid." App. 96, l. 8 – p. 97, l.-6; App. 144, lines 4-6. Counsel admitted that petitioner stated that he did not do this, but that "an alibi that leaves the door open to some possibility that someone could have been in two places is not an airtight alibi." App. 163, l. 8 – p. 164, l. 20' App. 165, lines 15-21.

Petitioner testified at the hearing and explained that he lived on Millwood Avenue across from the Laundromat in question at the time these events occurred, and that on that night he went to Suds Laundromat at approximately 10:50 pm after having imbibed nine beers and that he was involved in a fight at the laundromat at 10:55 pm on that same night. Petitioner stated that the police came shortly thereafter and arrested him. App. 168, l. 24 – p. 176, l. 21. Petitioner stated that trial counsel told him that there were discrepancies with the alibi and that technically his alibi defense was insufficient for use at trial. App. 177, lines 8-21; App. 178, lines 5-8; Tr. 179, lines 20-24. Petitioner stated that he wanted to be tried by jury in his case because he believed in his the

merit of his alibi defense. Tr. 178, l. 8 – p. 179, l. 16. Petitioner stated that he did not commit the pizza robbery and that he did not even know where the robbery took place (Maple Street).

In closing, PCR counsel made the following argument to the PCR judge:

> So certainly the evidence shows that that fight took place around 11 :00 o'clock that night. Now, with that being said, you have a very, very short timeline, roughly only 14 minutes from the time of the robbery to the time of the fight. And in that timeline, if [petitioner] is indeed the robber, which of course we say he is not, he has got to perform the robbery, he has got to distance himself from the scene, he has got to go nine or ten minutes away to where Suds is located, he has got to go into the bar and get in a fight, and the fight has got to break up, he has got to flee, and the people have got to make the calls. App. lines 5 – 17.
>
> Also, in transit he has got to get rid of the clothes, because the testimony clearly shows he wasn't wearing a hoodie. He has got to get rid of the money. He has got to get rid of the gun. He has to get rid of the ammunition. It is just too much for a man to have done. He certainly could not have done all of that in that very brief timeframe. App. 198, lines 18-25.
>
> And, Your Honor, finally, common sense also tells us, there is just no way in the world that a man who committed a robbery is going to immediately thereafter go get in a fight one mile away from the robbery in order to draw suspicion on himself. There would be no common sense for a person to do something like that. App. 200, lines 5 -11.

The PCR judge ruled that counsel's advice to petitioner that his alibi was not an absolute alibi and to accept the state's plea offer to the lesser offense to robbery did not constitute ineffective assistance of counsel at trial and that there was no prejudice because there was no complete alibi defense in existence in the case. App. 235-237.

As a rule, alibi, which means elsewhere, is a complete defense and is presented when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission. Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013); State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980); Walker v. State, 397 S.C. 226, 723 S.E.2d 610

(2013). Also, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). However, the defendant does not have to prove alibi; rather, it is the state's burden to prove that the defendant was present and participated in the crime. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Here, petitioner's alibi was meritorious in that it made it very unlikely that he committed the robbery because it was nearly impossible for petitioner to have robbed League, and run one-half mile to the Laundromat, and became engaged in an all-out fight at the laundromat all in a ten to fifteen minute span of time. Counsel's requirement that petitioner be "rock-solid" or iron-clad or "without holes" suggested that counsel apparently believed that the defendant had the burden of proof when actually the state had the burden of proving petitioner's presence at the scene of the robbery. Counsel's skewed view of the burden of proof in connection with the evaluation of petitioner's alibi claim and the incorrect legal advice given based on the same (i.e. abandon an alibi defense at trial) and plead guilty constituted ineffective legal representation in violation of the Sixth Amendment to the United States Constitution because but for the error, a reasonable probability exists that petitioner would have opted for a jury trial and been allowed to present his alibi defense in the case because the state's evidence against him was not overwhelming.

Finally, the show-up identification made in this case would not have precluded an alibi finding because the identification did not constitute overwhelming evidence of guilt because there was no other evidence connecting petitioner to the crime. The failure to request an alibi charge where alibi exists is prejudicial if there is no overwhelming evidence of guilt in the case. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). Compare the Gibbs case where the dissent pointed out that the defendant was prejudiced by counsel's failure to request an alibi charge because there was no overwhelming evidence present at trial establishing the defendant committed armed robbery

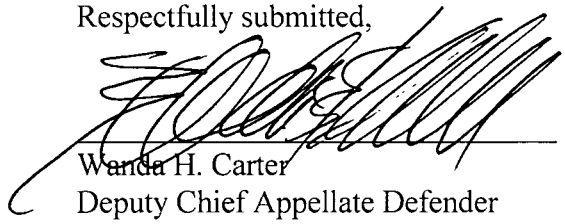
and kidnapping as "the police did not find a gun, money or any other physical evidence linking petitioner to the robbery," and "there was conflicting evidence concerning the color of the jacket the perpetrator wore and whether "a jacket found in the defendant's home was the jacket worn by the perpetrator." Similarly, in the case at bar, no gun and no money were ever recovered form petitioner or his (petitioner's) home linking him to the robbery charge. App. 123, l. 9 – p. 124, l.23; App. 11, lines 21-24. Also, there was a discrepancy as to the clothing League stated the robber wore as compared to the clothing petitioner wore when he was arrested at the laundromat on the night at issue. App. App. 125, l. 6 – p. 127, l. 17. Petitioner wore jeans and a gray top on the night in question when arrested, but the robbery description given was that the robber wore a black hoodie and black pants. App. 10, line 22; App 11, l.10-11;App. l7, lines 1-5.

Cleary, trial counsel's representation in connection with petitioner's alibi defense at the plea proceeding was below the standard of competence required of criminal attorneys and violated the Sixth Amendment. See also, Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced by counsel's deficient performance as he was unable to exercise his right to a trial by jury and present his alibi defense, and because a reasonable probability exists that he would not have been found guilty if he had been tried by jury.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Thomas Brooks, 2546 Millwood Avenue, Columbia, SC 29205, this 13th day of November, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of November, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.