

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Perry M. Buckner, Circuit Court Judge

RECEIVED

DEC 02 2013

S.C. Supreme Court

RICHARD SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001253

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not requesting a charge to the jury on alibi when Petitioner presented an alibi defense and the state's only evidence consisted of Petitioner's alleged confession made approximately nine years after the murder while he was drinking and the testimony of four jail informants who all recanted previous statements they made to law enforcement that Petitioner confessed to the crime?

STATEMENT

A Beaufort County Grand Jury indicted Petitioner at the October 28, 2004 term of General Sessions for murder and first degree burglary. App. 538-541. Petitioner's case was called to trial on November 13, 2006 before the Honorable Roger M. Young, and a jury. Assistant Solicitor Sean Thornton appeared on behalf of the prosecution, and Gene Hood represented Petitioner. App. 1. On November 17, 2006, the jury found Petitioner guilty. App. 442, ll. 11-16. He was sentenced by Judge Young to two concurrent terms of life imprisonment. App. 451, l. 20 – 452, l. 14.

The South Carolina Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. State v. Simmons, Op. No. 2011-UP-279 (S.C. Ct. App. Filed June 8, 2011). Petitioner raised the issue of whether the trial court erred by failing to charge the jury on alibi, but conceded it was not preserved for review. See App. 509, l. 22 – 510, l. 23; see also App. 534-535.

On September 1, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 454-460. The state filed a return to this application dated February 10, 2012. App. 461-465. The matter proceeded to an evidentiary hearing on April 1, 2013 before the Honorable Perry M. Buckner. App. 466. Assistant Attorney General Ashleigh R. Wilson represented the state, and Charlie J. Johnson represented Petitioner. Id. By order dated April 20, 2013, Judge Buckner denied Petitioner relief. App. 529-537.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not requesting a charge to the jury on alibi when Petitioner presented an alibi defense and the state's only evidence consisted of Petitioner's alleged confession made approximately nine years after the murder while he was drinking and the testimony of four jail informants who all recanted previous statements they made to law enforcement that Petitioner confessed to the crime.

Evidence Presented at Trial

On the morning of January 15, 1995, Charles Godley's body was found on the floor of his bedroom. There was a bloody hammer under his body and a pellet gun near his head. App. 126, ll. 1-21; App. 133, l. 9 – 134, l. 19. The law enforcement officers who investigated the scene, along with the coroner, initially assumed the death was the result of a suicide because there were no signs of forced entry or of a struggle inside the house. App. 126, ll. 11-13; App. 127, l. 18 – 128, l. 23; App. 138, l. 4 – 139, l. 10; App. 147, l. 14 – 148, l. 6. The officers had also been informed that the decedent was depressed and “suffering from emotional problems” after the recent death of his mother. App. 129, l. 7 – 130, l. 7. It was not until an autopsy was performed the following day that the death was ruled a homicide.

Clay Nichols, the pathologist who performed the autopsy, testified that there were two blunt force injuries to the decedent's head: one on his forehead and one on his right temple. Both injuries included lacerations to the skin, “circular abrasions,” and underlying skull fractures, which all caused bleeding and damage to the brain. App. 173, l. 14 – 175, l. 17. Dr. Nichols claimed that the injuries were caused by a heavy “rounded object” and were “consistent with blows from a hammer.” App. 175, ll. 21-25.

After Dr. Nichols concluded that the manner of death was homicide, law enforcement officers reevaluated the case and went back to the house to conduct further investigations. The police eventually discovered that the decedent's wallet was missing. It was never found. App. 104, l. 20 – 105, l. 11; App. 265, l. 25 – 266, l. 11. The police interviewed several suspects, including Petitioner, shortly after the death. Petitioner was initially interviewed after police received a tip. The lead investigator on the case in 1995, Stephen Davis, testified that Petitioner provided an alibi for the night of the death that the police were *never* able to discredit. App. 263, l. 22 – 264, l. 17; App. 267, ll. 5-15; App. 269, l. 6 – 271, l. 8.

The Beaufort County Sheriff's Office eventually ran out of leads and requested assistance from the South Carolina Law Enforcement Division (SLED). Little to nothing was done for the entire three years the case was being investigated by SLED. Eventually, in 1999, the case was reopened by the Beaufort County Sheriff's Office and assigned to Captain Robert Bromage, who investigated cold cases. App. 283, l. 7 – 284, l. 16; App. 297, l. 21 – 298, l. 12.

Over the course of the next several years, Bromage interviewed several jailhouse informants who implicated Petitioner in the crime and told Bromage that Petitioner confessed to the murder. App. 285, l. 7 – 289, l. 7. Captain Bromage recorded these conversations often without the informants' knowledge. App. 295, ll. 10-14; App. 329, l. 20 – 330, l. 1; App. 332, ll. 9-11. Several of these jailhouse informants, specifically Kevin Bentley, Clyde Evans, Arthur Singleton, and Thomas Davis, testified at the trial and *all four* recanted their statements that Petitioner confessed to them. Each explained that they either did not remember making such a statement or that they lied to Captain Bromage and gave him a statement implicating Petitioner because they wanted something in return and thought they would get something out of it. App.

325, l. 20 -332, l. 11; App. 335, l. – 338, l. 25; App. 339, l. 18 – 346, l. 11; App. 346, l. 21 – 352, l. 23.

In addition to interviewing the various jailhouse informants, Captain Bromage testified that he also worked with SLED to set up an undercover operation. Bromage explained that law enforcement had learned that Petitioner was homeless and living on the streets of Columbia, specifically in the Five Points area. Bromage described how an undercover SLED agent, Bruce Otterbacher, befriended Petitioner, provided him with money, and gained his confidence. Bromage testified that law enforcement was hoping to “find out if [Petitioner] was involved in it and if he would admit it, to the homicide that occurred in Beaufort County.” App. 289, l. 8 – 290, l. 25. Bromage claimed that Petitioner made “specific admissions” to Otterbacher that were recorded. App. 293, l. 24 – 294, l. 1.

Lieutenant Bruce Otterbacher testified that he was assigned to work the undercover operation and to meet Petitioner “on the street and gain his confidence and see if he had any involvement in this murder.” Otterbacher explained that he had four encounters with Petitioner during the month of September 2004 and that the last three were audio and video recorded. App. 354, l. 17 – 356, l. 20. The majority of the interactions during these encounters took place in an old “beat up” van owned by law enforcement. App. 360, ll. 5-11; App. 291, ll. 9-14.

Otterbacher testified that on the first encounter, he asked Petitioner if he wanted to earn one hundred dollars by helping Otterbacher break into a storage unit. Petitioner agreed and Otterbacher gave him twenty dollars to “build his confidence” and to make sure he showed up to their next meeting. App. 357, l. 19 – 359, l. 24.

During the second meeting, Petitioner and Otterbacher “broke into” an empty storage unit rented by SLED after Otterbacher falsely told Petitioner that it was his unit and that he wished to

file a false insurance claim. After breaking into the storage unit, Petitioner and Otterbacher talked for a while in the van. Otterbacher told Petitioner a fictitious story in which he claimed he had killed a man during a hunting accident. The two also talked about each other's wives and drug use. At the end of this meeting, Otterbacher gave Petitioner one hundred dollars. App. 359, l. 25 – 362, l. 25. Otterbacher admitted that he knew at least by the second meeting that Petitioner was using the money Otterbacher gave him to purchase crack cocaine. App. 365, l. 20 – 366, l. 11.

According to Otterbacher's testimony, during the third encounter with Petitioner, Otterbacher provided Petitioner with beer and, while the men were riding around in the van and drinking, Petitioner allegedly confessed to murdering the decedent by beating him in the head with a hammer. App. 363, ll. 1-8; App. 366, l. 12 – 367, l. 24. This alleged confession arose while Otterbacher was attempting to convince Petitioner to burglarize a home with him and while the two were discussing "if we got caught in a home by somebody, what would we do." App. 385, l. 15 – 387, l. 19. Otterbacher admitted that he was drinking and driving and violating the open container laws of this state. App. 363, l. 1 – 365, l. 19. Otterbacher testified that he gave Petitioner another twenty dollars during this meeting. App. 368, ll. 2-5.

On the fourth and final meeting, Otterbacher picked Petitioner up and, after telling Petitioner he would drive him to purchase crack cocaine, Otterbacher drove him to the SLED headquarters where he was subsequently arrested. App. 369, l. 22 – 370, l. 15.

During trial counsel's closing argument, he discussed Petitioner's alibi defense and the fact that police did little to investigate Petitioner's whereabouts on the night of the death. App. 426, ll. 1-15. Trial counsel stated:

[Stephen Davis] interviews Richard Simmons, gets details of where Richard Simmons was, who he was with, where he stayed

on Saturday night, Friday night through Saturday morning. Where was he at? Slept in the laundry mat. The woman who runs the place by the name of Betty came in and woke me up. I was wearing this clothing. What did Officer Davis do? He never even went to the laundry mat. He never even talked to this woman who was in the laundry mat. Richard Simmons said, "She can tell you exactly where I was. She woke me up." The whole nine yards.

Id.

There was absolutely no physical evidence connecting Petitioner to the crime. The only evidence presented against Petitioner at trial was the confession he allegedly made to the undercover agent in 2004 while he was drinking and the recanted statements made by the jailhouse informants. Petitioner also had no relationship with or connection to the decedent before his death.

PCR Hearing

Petitioner testified at the PCR hearing that when he was questioned in 1995 by law enforcement he provided an alibi for the night of the murder. Petitioner explained that he told the police that he was at the Island Plaza, presumably a shopping center where the laundromat was located, and that he stayed there overnight. Petitioner gave the names of three individuals he was with that night, including Reggie Daisè. He also explained that he told law enforcement that "Ms. Betty," who worked at the laundromat at the Island Plaza, would be able to verify his alibi. App. 473, l. 2 – 476, l. 18; App. 485, l. 1 – 486, l. 2. Petitioner testified that he told trial counsel about his alibi before trial. App. 480, ll. 8-19.

Petitioner explained that there was testimony about his alibi during his trial and that, now that he understands the law, he believes that his trial counsel should have requested a jury instruction on his alibi defense. App. 481, l. 15 – 483, l. 8.

Trial counsel, Gene Hood, testified that he was appointed to represent Petitioner and met with him at least twice every month prior to the start of trial. App. 501, ll. 16-24. He explained that he was aware that Petitioner provided law enforcement with an alibi in 1995 and that law enforcement was unable to discredit that alibi. However, trial counsel explained that he was unable to locate any witnesses that would have been able to support Petitioner's alibi due to the significant time gap between the night of the murder and the trial and thus he did not think he could present an alibi defense at trial because it was "uncorroborated." App. 487, l. 8 – 488, l. 4; App. 489, ll. 4-14; App. 490, l. 24 – 491, l. 6; App. 505, l. 19 – 506, l.6. Trial counsel also explained that Petitioner's alibi only covered a short period of the time during which the crime could have been committed. App. 501, ll. 9-15. He stated, "[T]here was still that time open where it was possible that he could have committed the crime. That was the problem." App. 498, ll. 8-12.

Trial counsel acknowledged that there was testimony at trial that Petitioner had provided law enforcement with an alibi and that law enforcement did not even look in to it. Trial counsel also admitted that he discussed Petitioner's alibi during his closing argument. App. 496, l. 10 – 498, l. 7. Trial counsel stated, "[T]hinking back on it, maybe I should have forced them, at least the court, given the court the opportunity to make the decision that there was insufficient evidence to give an alibi defense." App. 497, ll. 11-15.

Trial counsel concluded his testimony by explaining that he decided prior to trial not to proceed with an alibi defense because he "couldn't gather the people necessary to be able to do that." App. 508, l. 22 – 509, l. 4.

Order of Dismissal

The PCR court found Petitioner failed to meet his burden of proving trial counsel should have investigated Petitioner's alibi witnesses and requested an alibi instruction at trial. App. 534. The PCR court stated that trial counsel was not ineffective for failing to request an alibi charge because there were no witnesses or testimony to support the request for an alibi charge. The PCR court held that since Petitioner "failed to produce the alleged alibi witnesses at the evidentiary hearing, [Petitioner] failed to carry his burden of proving prejudice resulted from counsel's performance." App. 533-535. Accordingly, the PCR court concluded Petitioner failed to establish any constitutional violations or deprivations before or during his trial and thereby dismissed Petitioner's application. App. 536.

Discussion

Alibi should have been charged to the jury in this case because the evidence presented at trial indicated that Petitioner provided an alibi to law enforcement detailing his whereabouts on the night of the murder and that law enforcement was never able to make any dent in his alibi. Failure to charge alibi was reversible error because the state's *only* evidence consisted of Petitioner's alleged confession made approximately nine years after the murder while he was drinking and the testimony of four jail informants who all recanted the previous statements they made to law enforcement that Petitioner confessed to the crime.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The

proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

It is well settled law that "trial counsel's failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (citing Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994)). Where there is not overwhelming evidence of guilt, the failure to give an alibi charge where supported by the evidence is reversible error. State v. Robbins, 275 S.C. 373, 374-375, 271 S.E.2d 319, 319-320 (1980); see also Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013) (Toal, C.J., dissenting). An alibi charge places no burden on a criminal defendant, but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime. Roseboro at 294, 454 S.E.2d at 313 (citing State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943)); see also Gibbs at 496, 744 S.E.2d at 176.

In this case, trial counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel was deficient for failing to request a jury instruction on alibi since the evidence presented at trial indicated that Petitioner provided law enforcement with an alibi for the night of the murder when he was interviewed in 1995 and named individuals that could have verified his whereabouts. The evidence

further showed that the police were never able to discredit Petitioner's alibi and put forth little effort to substantiate Petitioner's whereabouts. App. 267, ll. 5-15; App. 269, l. 2 – 271, l. 4. Trial counsel emphasized this during his closing argument at trial. See App. 426, ll. 6-15. Thus, despite the fact that trial counsel was unable to locate Petitioner's alibi witnesses, there was sufficient evidence presented at trial to support an alibi instruction and trial counsel was ineffective for failing to request one. See Roseboro at 294, 454 S.E.2d at 313.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to request an alibi instruction prevented the jury from properly considering Petitioner's alibi defense during deliberations. The jury was not properly instructed that if the alibi evidence was sufficient to raise in the minds of the jury a reasonable doubt as to Petitioner's presence at the scene of the crime, Petitioner was entitled to an acquittal.

The present case is easily distinguished from Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), where this Court found no prejudice from counsel's failure to ensure that an alibi charge was given. In Ford, there was overwhelming evidence of the defendant's guilt, including DNA evidence, evidence that the defendant and the driver of the car in which the victim was riding were overheard planning the assault, and evidence that the driver was in possession of the defendant's wallet immediately following the assault. Id. at 246-248, 442 S.E.2d at 605-606.

The evidence against Petitioner was not overwhelming. There was absolutely no physical evidence connecting Petitioner to the murder. As emphasized above, the only evidence presented against Petitioner was the confession he allegedly made to the undercover agent in

2004 while he was drinking and the recanted statements made by the jailhouse informants. Additionally, there was no evidence of a relationship between Petitioner and the decedent before the decedent's death. Therefore, if trial counsel would have properly requested an alibi instruction or properly objected to the trial court's omission of an alibi instruction, it would have been reversible error had the trial court refused to charge alibi. See Robbins, at 374-375, 271 S.E.2d at 319-320.

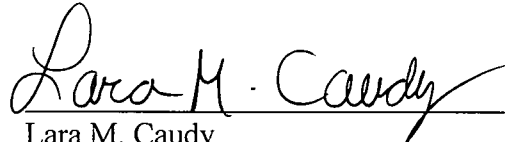
The PCR court's focus on the fact that Petitioner failed to produce the alibi witnesses at the evidentiary hearing is misplaced as Petitioner never alleged trial counsel was ineffective for failing to investigate the alibi witnesses, but rather that trial counsel was ineffective for failing to request an alibi instruction based on the evidence that was presented at trial, specifically that Petitioner provided law enforcement with an alibi that the police were never able to discredit. See App. 470, ll. 2-12; see also App. 483, ll. 19-24. Additionally, the evidentiary hearing was held over eighteen years after the decedent's death, which would have made locating such witnesses by PCR counsel extremely difficult.

Instructing the jury on alibi likely would have changed the outcome of the trial. Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in black ink that reads "Lara M. Caudy". The signature is written in a cursive style with a horizontal line underneath the name.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Perry M. Buckner, Circuit Court Judge

RICHARD SIMMONS,

PETITIONER,

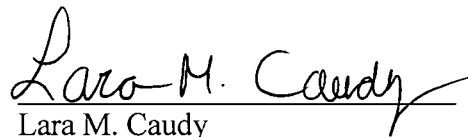
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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

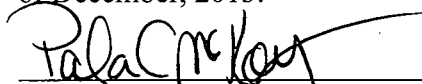
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of December, 2013.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of December, 2013.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.