

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

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JAN 08 2014

S.C. Supreme Court

JOHN PORTEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000732

JOHNSON PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment rights by failing to secure an alibi charge when there was evidence that the crime could have been committed when petitioner was in Georgia?

STATEMENT

On October 18, 2006, a Richland County grand jury indicted petitioner for armed robbery and two counts of murder. App. 794 – 797. On January 12, 2009, petitioner was tried before the Honorable J. Ernest Kinard and a jury. App. 1. John Meadors and Joanna McDuffie represented the State. App. 1. Douglas S. Strickler and Ashley Thomas represented petitioner. App. 1. The jury convicted petitioner. App. 629, l. 18 – 630, l. 6. On February 1, 2011, the Court of Appeals dismissed petitioner’s appeal. State v. Portee, No. 2011–UP–035 (S.C. Ct. App. Feb. 1, 2011).

On August 9, 2011, petitioner filed an application for post-conviction relief. App. 651. On November 2, 2011, petitioner filed an amendment to his PCR application. App. 670. On January 16, 2013, a hearing was held before the Honorable G. Thomas Cooper, Jr. App. 678. Robert D. Corney represented the State. App. 678. Tristan M. Shaffer represented petitioner. App. 678. On March 8, 2013, Judge Cooper denied petitioner’s PCR application. App. 771. On March 27, 2013, petitioner filed a *pro se* motion pursuant to Rule 59(e), SCRPC. App. 787. The PCR court did not rule on petitioner’s *pro se* Rule 59(e) motion. On April 9, 2013, petitioner’s attorney filed a notice of appeal, which was served on April 8, 2013. App. 798 – 99. The notice of appeal stated that petitioner’s attorney received notice of the order of dismissal on March 13, 2013. App. 798. This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment rights by failing to secure an alibi charge when there was evidence that the crime could have been committed when petitioner was in Georgia.

Relevant Facts

The bodies in this murder case were discovered sometime after 1:30 P.M. Patrice Trapp ("Trapp") was the manager of a Wendy's restaurant in Columbia. App. 133, ll. 14 – 25. On Sunday, September 3, 2006, Trapp went to church and then to a restaurant for lunch. App. 138, ll. 20 – 25. At approximately 1:30 PM, Trapp received telephone calls from other Wendy's employees telling her that her store had not been opened. App. 139, ll. 1 – 18. Trapp drove to the restaurant. App. 139, ll. 17 – 21. The front door and drive-through window were locked. App. 141, l. 20 – 144, l. 13. Trapp looked into the window and saw a faucet running and a sink overflowing. App. 144, ll. 18 – 24. Trapp walked to the back door, which was locked, and banged on it with no response. App. 148, l. 18 – 149, l. 10.

Trapp had forgotten her keys to the restaurant so, after borrowing a crowbar, she pried open the drive-through window. App. 151, ll. 3 – 152, l. 24. Trapp's son crawled through the window and unlocked the back door. App. 153, ll. 1 – 12. Trapp entered the restaurant and walked to the office. App. 155, l. 5 – 156, l. 13. She saw the bodies of two Wendy's employees and blood "everywhere." App. 156, ll. 5 – 13. She called 911. App. 156, ll. 10 – 13.

Dr. Stanson C. Kessler, a forensic pathologist, autopsied the bodies the next day. App. 522, ll. 2 – 9. Both of the victims died from gunshot wounds. App. 524, l. 2 – 526, l. 8. App. 527, l. 9 – 530, l. 9. App. 532, ll. 19 – 24. Dr. Kessler was never asked by the State to give an opinion as to

the victims' time of death. App. 518, l. 22 – 534, l. 25. Defense counsel failed to ask the pathologist any questions. App. 535, l. 1.

Petitioner did not testify at trial, but testified at the PCR hearing. Petitioner worked at the Wendy's restaurant. App. 683, l. 24 – 684, l. 1. He was scheduled to work the morning of the murders. App. 684, ll. 2 – 3. Petitioner's girlfriend, Heather Hunter ("Hunter"), rode with petitioner to work and he arrived at approximately 8:30 AM. App. 682, l. 23 – 683, l. 4. He knocked on the door and no one answered. App. 682, l. 23 – 683, l. 1. He waited five minutes, tried the doorbell again and looked through the drive-through window, but did not see anyone. App. 683, ll. 8 – 16. It was not unusual that no one was at the restaurant because the manager frequently did not arrive until 9:30 AM or 10:00 AM. App. 684, ll. 13 – 18. Petitioner was not able to get inside the store by himself. App. 684, ll. 19 – 21. He left with Hunter. App. 683, ll. 8 – 16.

Petitioner and Hunter decided to go to Georgia to get Hunter's daughter and visit a sick relative. App. 685, ll. 5 – 9. They left for Georgia between 9:00 AM and 9:30 AM. App. 685, ll. 10 – 13. They drove to Augusta. App. 685, ll. 14 – 16. They stayed in Augusta until approximately 2:00 PM. App. 685, ll. 22 – 23. They came back to Columbia and petitioner went to the mall, visited a friend, and rented some videos with Hunter. App. 686, ll. 1 – 19. On the way to Hunter's house, petitioner saw that a friend was having a cookout. App. 686, l. 17 – 22. As he was walking to his friend's house, he was arrested by police. App. 686, l. 17 – 687, l. 6. Cell phone records produced at the PCR hearing (but not at trial) showed calls originating in Georgia beginning at 11:15 AM that morning. App. 770.

Another Wendy's employee named Stephanie Crumpton ("Crumpton") was scheduled to work that morning at 10:00 AM. App. 178, ll. 15 – 19. She arrived shortly before 10:00 AM. App. 179, ll. 19 – 20. No one answered the doorbell. App. 178, ll. 20 – 23. She looked through the

drive-through window and saw no one. App. 178, ll. 23 – 25. She saw the water running. App. 178, ll. 24 – 25. Another employee, Jahquetta Owens (“Owens”) arrived. App. 179, ll. 6 – 9. Crumpton left. App. 179, ll. 8 – 9.

Owens arrived at 11:00 AM. App. 199, ll. 18 – 19. She knocked on doors with no response and saw water running inside when she peered from the drive-through window. App. 200, ll. 1 – 18. She put a note on one of the victim’s cars and left. App. 201, l. 6 – 202, l. 14.

Kelly Jones (“Jones”), a Wendy’s employee who worked at another location, claimed she called the Wendy’s where the murders occurred that morning at approximately 8:15 AM. App. 213, ll. 16 – 25. She chatted with one of the victims. App. 214, ll. 1 – 17. Jones called again at approximately 8:40 AM and no one answered. App. 214, l. 18 – 215, l. 9. Trial counsel did not ask Jones any questions, including whether employees who were busy preparing the store for the day’s business might not answer the phone before it opened or how Jones was able to recall the specific times she called. App. 215, l. 12.

Hunter testified that she and petitioner left that morning for Wendy’s sometime after 8:00 AM. App. 290, ll. 5 – 7. They parked in the rear of the restaurant. App. 290, ll. 14 – 18. She saw petitioner knock on the door and return to the car where he told her, “Hold up a minute.” App. 290, l. 22 – 291, l. 7. Petitioner sat in the driver’s side of the car and told Hunter he got no answer at the door. App. 291, ll. 8 – 12. Petitioner then “went back,” but Hunter said, “Where he went I don’t know.” App. 291, ll. 8 – 12. At trial, she claimed to hear two “noises.” App. 291, ll. 17 – 21. Petitioner got back in the car and they left. App. 291, ll. 19 – 21. Hunter corroborated petitioner’s PCR testimony that they then went to Georgia. App. 293, ll. 2 – 5.

Hunter admitted that in her first two statements to the police, she never mentioned anything about hearing “noises.” App. 301, ll. 1 – 19. Hunter also wrote petitioner a letter stating that she

“never heard any noise.” App. 325, ll. 6 – 17. The State charged Hunter with misprison of a felony. App. 302, ll. 20 – 23. Hunter testified that she was “intimidated” and “scared” throughout “the whole thing,” meaning when she gave her statements up to her testimony at trial. App. 314, ll. 3 – 11.

Discussion

Trial counsel was constitutionally ineffective for failing to submit an alibi notice to the State and securing an alibi charge from the trial judge. This ineffectiveness prejudiced petitioner. See Strickland v. Washington, 466 U.S. 668 (1984). But for trial counsel’s failure, there was a reasonable probability the outcome of the trial would have been different. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

During the trial, defense counsel admitted he never sent a notice of alibi to the State. App. 546, ll. 1 – 10. Such a notice must be sent to the State and follow the specific requirements of the rules. See Rule 5(e), SCRCrimP. An attorney who fails to send an alibi notice to the State and therefore fails to obtain an alibi charge is ineffective. See State v. Watkins, ___ S.C. ___, ___ S.E.2d ___, 2013 WL 6252433 No. 27334, Shearouse Adv. Sheet No. 51 (Dec. 4, 2013) (stating in procedural history of case that appellant’s trial lawyer had previously been held ineffective by South Carolina Supreme Court for failing to send an alibi notice).

Despite his failure to provide the State with an alibi notice, trial counsel requested an alibi charge and this request was denied by the trial judge. App. 546, l. 1 – 548, l. 2. Trial counsel presented no argument to support this request and acquiesced in the trial judge’s ruling. App. 546, l. 1 – 548, l. 2. The trial judge applied an incorrect standard, citing the defendant’s exercise of his constitutional right not to testify and the fact that “he did not present a defense” as reasons for declining to give the charge. Trial counsel failed to argue that these were improper considerations.

Nor did trial counsel cite the “any evidence” standard applicable to whether a jury charge is to be given. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The facts must be looked at in the light most favorable to the party requesting the charge. Id.

The PCR court also failed to recognize this standard. Relying solely on Jones’ testimony regarding her telephone calls, it determined that the crime must have occurred between 8:15 AM and 8:40 AM. App. 776-78. This ignores that the bodies were not found until after 1:30 PM. It also ignores the fact that the jury was free to disbelieve Jones’ testimony regarding her telephone calls. Hunter placed petitioner in Georgia for the lion’s share of the time during which this crime could have been committed. This entitled petitioner to an alibi charge.

“The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error. State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980). The failure to secure a charge constitutes inadequate legal representation. See Riddle v. State, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992). In Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), the Court found prejudice in counsel’s failure to request an alibi charge because the State’s evidence was wholly circumstantial. Under the facts of Roseboro, the Court found the alibi charge particularly critical.

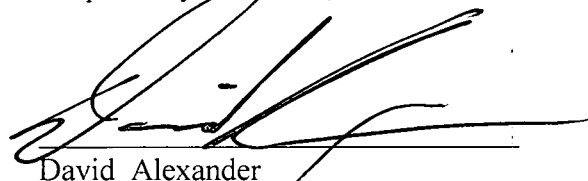
Similarly, in this case, the evidence against petitioner was entirely circumstantial. No one witnessed the crime. He did not confess. No forensic evidence placed petitioner inside the restaurant on the day of the crime. Even though blood was “everywhere” at the crime scene, no blood was ever found on petitioner or any of his belongings, including money the State intimated came from Wendy’s. The pathologist failed to give a time of death. While the gun found in a bag along with petitioner’s papers is admittedly some evidence, it certainly does not rise to the level of “overwhelming evidence of guilt” as found by the PCR court.

The trial court did charge that the State bore the burden of proof that the defendant was at the scene of the crime, but did not—as would have been made clear in an alibi charge—explicitly tell the jury that the defendant bears no burden of proof when alibi is a defense. State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959), *cert. denied* 363 U.S. 846, 80 S.Ct. 1616, 4 L.Ed.2d 1728 (1960), citing 23 C.J.S. Criminal Law § 923, p. 200; State v. McGhee, 137 S.C. 256, 135 S.E. 59; State v. Floyd, 174 S.C. 288, 177 S.E. 375; State v. Bealin, 201 S.C. 490, 23 S.E.2d 746. The trial court also did not tell the jury that an alibi defense does not require the accused to testify. Id. Nor did it tell the jury that an alibi may be established by the State’s witnesses. Id. Had trial counsel advanced an alibi defense and petitioner received this charge, the outcome of this case would have been different.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of a new trial for petitioner.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

JOHN PORTEE,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000732

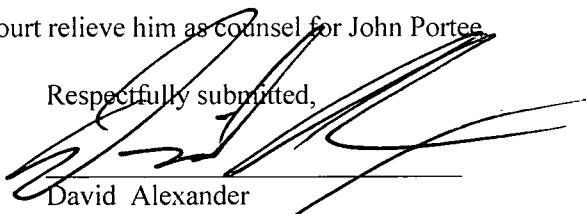
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Portee states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 16, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for John Portee.

Respectfully submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of January, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
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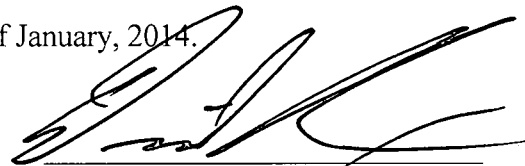
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-000732

CERTIFICATE OF SERVICE

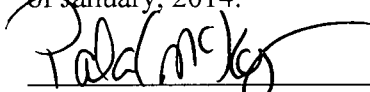
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and John Portee, #263560, at Broad River Correctional Institution this 8th day of January, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of January, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.