

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

2011-CP-40-7395
Appellate Case No. 2013-000571

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S. C. Supreme Court

THOMAS BROOKS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ISSUES PRESENTED

- I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for advising Petitioner to plead guilty, where Petitioner's alibi defense did not amount to a physical impossibility that Petitioner could not have committed the crime?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted at the May 2009 term of the Richland County Grand Jury for Armed Robbery (2009-GS-40-1154). He was represented by Rhodes Bailey, Esquire. On September 22, 2010, following a guilty plea, the Applicant was sentenced by the Honorable R. Lawton McIntosh to twelve years imprisonment provided that upon the service of seven years the balance is suspended with three years probation.

Thereafter, Petitioner filed a timely application for PCR on September 23, 2011, alleging he was being held in custody unlawfully. Respondent made its Return on June 25, 2012, requesting that an evidentiary hearing be held on Petitioner's application.

On Friday, September 14, 2012, an evidentiary hearing on the matter was convened before the Honorable J. Ernest Kinard, Jr., at the Richland County Courthouse. By Order dated December 31, 2012, Judge Kinard denied and dismissed Petitioner's application with prejudice. Petitioner filed a rule 59(e) motion to Alter or Amend judgment on January 17, 2013. By Order filed March 19, 2013, Judge Kinard Denied Petitioner rule 59(e) motion. Petitioner subsequently filed a Petition for Writ of Certiorari on November 13, 2013. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application 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 the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. 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. With respect to guilty plea

counsel, the Petitioner must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

ARGUMENT

I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for advising Petitioner to plead guilty, where Petitioner's alibi defense did not amount to a physical impossibility that Petitioner could not have committed the crime?

Petitioner argues the PCR court erred in finding that Counsel was not ineffective for advising Petitioner that his alibi was not an absolute alibi and to accept the State's plea offer to the lesser offense of robbery. Petitioner further argues Counsel testimony during the PCR hearing suggests that Counsel mistakenly believes that Petitioner had the burden of proving alibi. However, this argument is without merit as ample probative evidence supports the PCR court's finding.

During the PCR hearing, Petitioner testified that he lived directly across the street from Suds Laundry mat (Suds), a bar/laundry mat. (App. p. 169 line 20-23). Petitioner testified that he went across the street to Suds to purchase some beer, but was denied because he was too intoxicated. (App. p. 171 line 23-25). Petitioner testified he asked some friends to purchase a beer for him and they did not return the proper amount of change. (App. p. 171 line 16—p. 173 line 14). Petitioner testified he got into a fight around 10:55 pm as a result of the incorrect change. (App. p. 174 lines 5-13). Petitioner testified following the fight he went back home and approximately an hour and fifteen minutes later the police arrived at his house and arrested him. (App. p. 174 line 23—p. 176 line 1).

During the PCR hearing, Counsel testified from the beginning of his representation, Petitioner stated he "wanted a good deal and that that was more important than asserting his innocence." (App. p. 137 lines 20-24). Counsel further testified Petitioner told him that he was in an altercation at Suds. (App. p. 85 line 3—p. 86 line 20). Counsel testified his investigator interviewed various witnesses to the altercation. (App. p. 85 line 3—p. 86 line 20). Counsel

testified he reviewed witness statements and EMS Records. (App. p. 86 line 9—p. 88 line 17). Counsel stated there were several discrepancies that could be pointed out had Petitioner presented an alibi defense. First, Counsel stated Petitioner was positively identified by the Victim. (App. p. 94 line 5-8). Second, Counsel stated the timeline was inconsistent. Specifically, Counsel stated everything alleged to have happened occurred within a close proximity to each other. (App. p. 94 line 7-9). Counsel stated Petitioner lived in the area where the robbery occurred and Suds was in close proximity to incident location. (App. p. 94 lines 10-11). Third, Counsel stated there were several different accounts of the incident. Specifically, Counsel testified Terrance Thompson (Thompson), victim who was assaulted at Suds, stated the fight occurred at eight o'clock, however the EMS report showed eleven o'clock. (App. p. 94 lines 12-16). Counsel stated he looked at the timeline and thought it was conceivable that a jury could find that Petitioner had committed the robbery and been in the fight at Suds. (App. p. 94 line 22—p. 95 line 1). Counsel ultimately concluded, "I didn't think it (alibi) was that strong. I'm not saying it was terrible, but I didn't think it was that strong." (App. p. 93 lines 23-25).

In addition to the testimony provided during the hearing, PCR Counsel introduced various exhibits establishing a purported timeline.¹ PCR Counsel introduced a receipt from Pop's Pizza showed a phone call ordering the food and setting up the robbery was made at 10:12 p.m. (App. p. 104 line 12—p. 104 line 23). PCR Counsel introduced the 9-1-1 call showing that a call came in from Sud's laundry at 10:56. (App. p. 105 line 6—p. 107 line 10). Based off of the evidence presented, PCR Counsel argued that you had only fourteen minutes from the time of

¹ The PCR Court found Respondent objected to the introduction of the witness statements on grounds of hearsay; therefore, the documents were introduced for the purpose of the PCR court to analyze the reasonableness of counsel's actions resulting from his review of the statements and not for the truth of the matter asserted in the statements. (App p. 237).

the robbery to the time of the fight, which occurred within one-half mile of each other. (App. p. 198 line 7-8). However, the PCR court specifically found:

[Petitioner] has attempted to create one, all-inclusive timeline based on the inconsistent temporal approximations of witnesses/victims as set forth in their statements to law enforcement and a private investigator, the computer automated records of several state agencies, the incident reports of several different law enforcement offices conducting investigations at differing crime scenes, and the estimated commuting time between two points when traveled by paved road and calculated using an undisclosed 'average' walking pace. The times set forth in each of the documents have not been shown to be synchronized with each other in any way to provide a cohesive minute-by minute timeline. Therefore, the evidence obviously establishes only an approximation of Applicant's alleged movements on the night in questions and have been analyzed by this court accordingly.

(App. p. 236-237). The PCR court found Petitioner "failed to provide [the PCR] court with sufficient evidence to establish a *physical impossibility* that he both committed the robbery *and* was involved in a fight with Thompson. This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

"Since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only *less likely* the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012) (emphasis added). Furthermore, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Here, Counsel stated he investigated, met with various witnesses, and created a timeline in an attempt

to establish a potential alibi defense. After a thorough investigation, Counsel ultimately concluded it was conceivable that a jury could find that Petitioner had committed the robbery and been in the fight at Suds. (App. p. 94 line 22—p. 95 line 1). As such, Counsel action's and advice were reasonable under professional norms.

Additionally, where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the Petitioner's guilt in Ford was overwhelming and the court held that Petitioner failed to prove the second prong of Strickland, which requires that Petitioner show prejudice by the deficient representation. Likewise, Petitioner has shown no prejudice resulting from any alleged deficient representation. During the guilty plea hearing, the Solicitor stated, approximately ten minutes after the armed robbery occurred, the police saw an individual matching the description given out through the BOLO run into Suds and then immediately come back out. (App. p. 11 lines 12-16.) The Solicitor further stated, the individual that entered Suds and left shortly thereafter was Petitioner. (App. p. 11 lines 16-17). The Solicitor further stated the description of the clothing given by the Victim matched the clothing worn by Petitioner and was taken into evidence. (App. p. 16 lines 7-16). Additionally, during the PCR hearing, Counsel stated the Victim was one hundred percent certain that Petitioner was the person who robbed him, as Petitioner was not wearing a mask during the robbery. (App. p. 158 lines 12-19).

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

DANIEL GOURLEY
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Bar No. 100934

By: 
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March 3, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge
Case No. 2011-CP-40-7395
Appellate Case No. 2031-000571

THOMAS BROOKS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.


PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 3rd day of March, 2014.


for DANIEL GOURLEY
Assistant Attorney General
S.C. Bar No. 100934

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ALAN WILSON
ATTORNEY GENERAL

March 3, 2014

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MAR 03 2014

S.C. Supreme Court


The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Thomas Brooks v. State of South Carolina**
Appellate Case No. 2013-000571

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,


Daniel Gourley
Assistant Attorney General
S.C. Bar No. 100934

MEH/ko
Enclosures

cc: Wanda H. Carter, Esquire, Appellate Defense
Trisha Allen, Victim's Services