2010-172790

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEE COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge
Case No. 2008-CP-31-0021

DORIAN CAIN, ...RESPONDENT,

v.

STATE OF SOUTH CAROLINA, ... PETITIONER.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

INDEX

QUESTIONS PRESENTED

1. Does evidence support the PCR court's finding of ineffective assistance of counsel in failing to present additional alibi witnesses where (a) counsel articulated sound reasoning for his choice of witnesses and (b) the applicant presented no testimony from additional alibi witnesses?
2. Does evidence support the PCR court's finding that trial counsel was ineffective in spending an inadequate amount of time with Cain where Cain set forth no evidence of what benefit additional consultation would have yielded?
3. Did the PCR court err in allowing Cain to locate and depose an additional witness who could have testified at PCR hearing as part of his Motion to Reconsider the Order of Dismissal?
4. Does evidence support the PCR court's finding that counsel was ineffective in failing to present additional testimony regarding Cain's December 1 surgical procedure ?

STATEMENT OF THE CASE

Respondent Dorian Cain ("Cain") was indicted for two (2) counts of Armed Robbery (2004-GS-31-0006). (App. pp. 514-517.) A jury trial was held before the Honorable Clifton Newman. (App. pp. 1-384.) On April 8, 2004, Cain was found guilty of both counts. Judge Newman sentenced him to the minimum ten (10) years imprisonment on each count, sentences to be served concurrently. (App. pp. 512-513.)

In a written motion dated April 16, 2004, Cain moved for a new trial pursuant to Rule 29, SCRCrimP, appending an affidavit from one of the robbery victims, James Reames ("Reames") disavowing his courtroom testimony. (App. pp. 524-526.) At a hearing on the motion on June 23, 2004, Reames denied that he had written the affidavit and affirmed his trial testimony. (App. pp. 385-439.) Judge Newman denied the motion. (App. p. 425, line 9 – p. 429, line 4.)

A notice of appeal was filed and an appeal perfected. (App. pp. 440-494; pp. 539-540.) The South Carolina Court of Appeals affirmed Cain's convictions and sentences. State v. Cain, Op. No. 2006-UP-387 (S.C. Ct. App. filed November 28, 2006). (App. pp. 495-504.) Cain's Petition for Rehearing was denied on January 29, 2007, and the Remittitur was sent on March 5, 2007. (App. p. 505-511.)

Cain filed his application for post-conviction relief (PCR) on January 29, 2008 (2008-CP-31-0021). (App. pp. 541-552.) An evidentiary hearing was held on October 26, 2009, before the Honorable R. Ferrell Cothran, Jr. (App. pp. 557-637.) In a written order dated December 22, 2009, and filed December 30, 2009, Judge Cothran denied and dismissed the application with prejudice. (App. pp. 639-648.) Cain submitted a Motion to Reconsider Order of Dismissal dated January 6, 2010, and an Amended Motion to Reconsider Order of Dismissal dated January 7, 2010. On March 23, 2010, Judge Cothran convened an informal conference on the motions. (See App. p. 664.) The State opposed Cain's request to procure an additional witness and take

testimony through the Motion to Reconsider. (App. p. 664-665.) Over this objection, Judge Cothran granted leave for Cain to procure a medical expert. (App. p. 666.) The deposition of Dr. Pickens K. Moyd was taken on June 2, 2010. (App. pp. 667-727.) Following the submission of proposed orders from the parties (App. pp. 728-731), Judge Cothran issued an order dated September 13, 2010, and filed September 14, 2010, granting Cain a new trial on the basis of ineffective assistance of counsel.

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 PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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, 80 L.Ed.2d 674, 692 (1984); Butler, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant 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 the Applicant 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.

SUMMARY OF FACTS ADDUCED AT TRIAL

On the morning of December 18, 2003, James Reames ("Reames") and Edward Scott ("Scott") were cleaning out a building that was about to be torn down in Bishopville, removing barber's chairs and other items. (See for example App. p. 102, line 3 – p. 103, line 9; p. 121, line 19 – p. 122, line 25.) Just before 11:00 am, three young men entered the building. (App. p. 103, lines 10-19; p. 123, lines 1-3 & 14-16.) Two were armed. (App. p. 106, lines 21-24; p. 123, lines 3-4.) Reames and Scott complied with demands for their wallets. (See for example App. p. 106, lines 5-20; p. 123, lines 5-13; p. 124, lines 20-23.) Reames and Scott saw the boys run out the door and a short distance outside. (See for example App. p. 111, lines 13-22; p. 125, lines 20-23; p. 133, line 20 – p. 135, line 5.)

Reames and Scott got a ride to the police station and reported the robbery. (App. p. 126, line 16 – p. 127, line 8; p. 137, lines 12-25.) They described the perpetrators as "three young, black males... one tall one that was medium complexion and wearing a white t-shirt and two short darker skin but they could not remember what kind of clothes they had on." (App. p. 243, lines 16-22.) The dispatch regarding the armed robbery went out at 11:16 am. (App. p. 161, lines 23-25.) Shortly thereafter, Officer Ernest Moseley ("Moseley") observed a vehicle within blocks of the scene which he believed was traveling too fast and failed to completely stop at a stop sign. (App. p. 185, lines 3-5; p. 197, lines 14-18.) A driver and three passengers were inside the vehicle. (App. p. 188, lines 5-8.) Moseley observed that one of the back seat passengers, later identified as Cain, kept looking back at him. (App. p. 185, lines 8-9; p. 186, lines 8-13; p. 188, lines 10-16.) Moseley stopped the vehicle a short distance from the scene. (App. p. 175, lines 13-18; p. 186, lines 1-5.) Moseley observed Cain remove a white t-shirt, leaving a dark t-shirt underneath. (App. p. 188, line 20 – p. 189, line 22.)

Reames and Scott were brought to the traffic stop. (App. p. 127, lines 13-15.) Both identified Cain as one of the perpetrators who had a gun. (See for example App. p. 104, lines 21-23; p. 106, line 25 – p. 107, line 2; p. 108, line 9 – p. 109, line 6; p. 127, line 17 – p. 128, line 22; p. 164, lines 12-15; p. 190, lines15-24.) Scott was particularly adamant, noting that Cain was the one who had a gun on him. (See for example App. p. 144, line 25 – p. 145, line 20; p. 146, lines 2-7.) Scott was a master barber and emphasized that by his training he was especially attuned to observe the face and head. (App. p. 146, line 9 – p. 147, line 17.) None of the other vehicle occupants were identified by Reames and Scott as perpetrators. (App. p. 109, lines 7-10; p. 128, lines 10-12.)

Officer Thomas Burke ("Burke") testified that he had seen Cain and two other shorter males near the scene of the robbery shortly before 11:00 am, and Burke immediately recognized Cain in the backseat of the stopped vehicle. (App. p. 154, line 4 – p. 155, line 24; p. 163, lines 4-21.) Burke recalled that Cain had been wearing a white t-shirt the first time he saw him (App. p. 163, lines 22-25). No guns or wallets were recovered. (App. p. 165, line 23 – p. 166, line 7.) Cain had approximately $12.00 in his pockets at the time of his arrest. (App. p. 223, line 25 – p. 224, line 1.)

Cain presented an alibi defense. Cain testified that he had been at the home of LeQuint Johnson ("LeQuint") that morning from a little after 9:00 am until after 11:00 am. (App. p. 283, line 24 – p. 285, line 3; p. 300, lines 1-21.) Cain stated that he had then left in a car with LeQuint and two others to go get a key made at a nearby hardware store. (App. p. 285, lines 4-21; p. 300, line 25-p.301, line 7; p. 302, line 4 – p. 303, line 1.) LeQuint's mother, Alphine Johnson ("Johnson") testified that Cain had come to her house at 9:16 am and had left with LeQuint after 11:00 am. Johnson testified that Cain wore a white t-shirt and dark jacket.

In his testimony, Cain maintained that he removed his t-shirt because stuff out of the seat was getting on it. (App. p. 286, lines 4-10; p. 304, line 18 – p. 306, line 12.) Cain denied that he had been near the scene as Burke described. (App. p. 289, lines 15-21; p. 301, lines 13-21.) Cain also denied looking back as Moseley described. (App. p. 303, lines 19-21.) Cain presented a medical report indicating that he had undergone surgery on an undescended testicle on December 1, a little over two weeks before the robbery. (App. p. 290, line 17 – p. 291, line 3; p. 291, line 24 – p. 296, line 22.) Cain testified that due to the sutures from the surgery still attached to his leg, he had been unable to run at the time of the incident. (App. p. 289, line 22 – p. 290, line14; p. 291, lines 20-23.) Cain posited that because he could not run, Reames and Scott must be mistaken in their identification of him because the perpetrators were said to have run from the scene.

In reply, Chief Alta Simon ("Simon") testified that she had gone to Johnson's house after the traffic stop. In contrast to the alibi testimony, Simon reported that Johnson had said at that time that Cain, LeQuint, and another young man had left her home on foot about an hour or two before, well before 11:00 am. (App. p. 314, line 4 – p. 316, line 24.) This description coincided with the group that Burke had seen near the scene of the crime. Simon further noted that, contrary to Cain's claim that the group was heading to the hardware store, the vehicle was heading away from the hardware store when it was stopped. (App. p. 318, line 20 – p. 319, line 13.)

The prosecution case centered on Reames' and Scott's identification of Cain as one of the perpetrators and the circumstantial evidence placing Cain in the vicinity just before the crime. Both victims identified Cain at the scene and in court.[1] (See for example App. p. 103, line 20 – p. 104, line 1; p. 107, lines 17-22; p. 108, line 9 – p. 109, line 6; p. 123, line 23 – p. 124, line 3; p.

[1] Counsel's motions to suppress the identification as unduly suggestive and to dismiss for lack of probable cause for the traffic stop were denied.

151, line 24 – p. 152, line 2.) Reames and Scott claimed to have seen Cain before. (App. p. 117, lines 3-23; p. 129, lines 16-24.) Cain also had seen Reames and Scott before. (App. p. 307, line 25 – p. 308, line 8.)

In his Motion to Set Aside Verdict, Cain submitted an affidavit from Reames, obtained by Cain's counselor Janita Robinson ("Robinson") and Cain's sister, in which Reames recanted his identification of Cain. At the motion hearing, Reames repudiated the affidavit and stood by his trial testimony. (App. pp. 385-438.)

ARGUMENT

I. The PCR court's finding that Counsel was ineffective in failing to present additional alibi witnesses is without evidentiary support in the record.

Alibi was Cain's primary defense. (See for example App. p. 608, lines 4-6; p. 619, lines 4-6.) Upon reconsideration, the PCR court found that Counsel "did not 'articulate a valid reason' ... for "failing to offer additional witnesses' testimony corroborating Applicant's alibi." (App. p. 743.) The PCR court found further that this was "unreasonable under all the circumstances of this case." (App. p. 744.) With regard to prejudice, the PCR court found generally that this error and others "undermined propped functioning of the adversarial process and the trial cannot be relied on as having produced a just result." (App. p. 744.)

At trial, Cain and Alphine Johnson ("Johnson") provided alibi testimony. Cain argues that Counsel should also have presented testimony from Johnson's son, LeQuint Johnson ("LeQuint"). Counsel knew about LeQuint. (App. p. 619, lines 15-23.) Counsel stated that LeQuint had a juvenile record which caused him concern, and LeQuint's later conviction of another crime was mentioned.[2] (App. p. 619, line 23 – p. 620, line 4.) In talking with court personnel, Counsel found that LeQuint was often in juvenile court. (App. p. 630, lines 3-13.) There was also trial testimony that LeQuint had told police officer Alta Simon that Cain spent the night with him the night before. (App. p. 248, lines 23-25.) This would have been inconsistent with testimony of Cain and Johnson at trial that Cain arrived at Johnson's home that morning. (See App. p. 263, lines 18-24; p. 264, lines 6-11; p. 301, lines 8-12.) Other than Cain, the only potential alibi witnesses were Johnson, LeQuint, and the other two young men in the vehicle. Of the potential alibi witnesses, Counsel felt that Johnson was the strongest choice.

[2] This court may take judicial notice that Counsel represented LeQuint in another matter involving the murder of Reames' brother. State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010).

Johnson was an adult and in speaking with her prior to trial Counsel felt she was a "pretty decent witness." (App. p. 630, lines 13-25.)

Counsel articulated a reasonable strategy for his presentation of the alibi defense through the testimony of Cain and Johnson and for not calling LeQuint. Moreover, Cain demonstrated no prejudice in this regard. Neither LeQuint nor any other alibi witness testified at any time during the PCR proceedings. "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." Glover v. State, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995). Because no additional alibi witness was called, the record does not support a finding of prejudice in this regard.

II. The PCR court's finding that Counsel spent an inadequate time consulting with Cain is without evidentiary support in the record.

The PCR court further found that Counsel "having spent only two hours and forty-five minutes with [Cain] in preparation for trial" to be an indicator of unreasonable performance. As with the other findings, the PCR court made a generalized finding that this shortcoming "prejudiced Applicant because it undermined the proper functioning of the adversarial process and the trial cannot be relied upon as having produced a just result." (App. p. 744.)

At PCR hearing, Cain implied that Counsel's time with him was inadequate, especially in light of his diagnosis of ADHD. Counsel first met with Cain's mother in late January 2004, only a few months before the April 2004 trial. (App. p. 602, line 15 – p. 603, line 3; p. 626, lines 1-4.) Counsel stated that Cain's mother brought Cain to Counsel's office about a month after he was retained and the three discussed the case. (App. p. 601, lines 3-9). Counsel hired a detective and received discovery materials. (App. p. 603, line 4 – p. 604, line 18; p. 605, line 22; p. 626, lines

5-22.) Counsel stated that the case was fairly straightforward in that the evidence primarily consisted of the identification by the two victims, Reames and Scott. (See for example App. p. 626, lines 5-19.) Counsel recalled meeting with Cain following an "incident" at a store in Florence which did not result in criminal charges. (App. p. 604, line 22 – p. 605, line 5.) Counsel further stated that Mother and possibly Cain came to his office in the week preceding trial. (App. p. 605, lines 12-20; p. 606, lines 14-20.) While Cain implied that his youth and diagnosis of ADHD made him a "difficult" client, Counsel did not believe that Cain was a difficult client, noting that Cain seemed to understand the proceedings and was "definitive" and "pretty convincing" in his denial of guilt. (App. p. 606, line 21 – p. 608, line 3; p. 615, lines 7-16; p. 627, line 23 – p. 628, line 2.) When the decision was made that Cain would testify, Counsel felt that their brief preparation was adequate. (App. p. 611, line 17 – p. 612, line 11.)

The State submits that under the particular facts and circumstances of Cain's case, Counsel's time with his client and Mother was not unreasonable. Moreover, Cain has made no demonstration of what benefit additional time with Counsel would have yielded. The PCR judge made no specific finding in this regard. Therefore, it is merely speculative that counsel's alleged deficiency in spending time with Cain was prejudicial to Cain. See for example Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145 - 146 (2008) (no prejudice where applicant did not offer any evidence or argument as to how alleged lack of preparation prejudiced him).

III. The PCR court erred in accepting new, additional witness testimony through Cain's Motion to Reconsider Order of Dismissal.

Following the PCR court's Order of Dismissal, Cain made a Motion to Reconsider Order of Dismissal and an Amended Motion to Reconsider Order of Dismissal (hereinafter "Motion").[3]

[3] Though the Motion cites no specific Rule of Civil Procedure, it is captioned as a Motion for Reconsideration and not as a Motion for New Trial. The Motion was interpreted by all as a motion to alter or amend judgment pursuant to

(App. pp. 649-655.) Acknowledging the State's argument that a party cannot use a Rule 59(e) motion to present to the court an issue the party could have raised prior to judgment but did not (Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009)), the PCR court found that because Cain presented the issue of his attorney's presentation of evidence regarding his testicular surgery, Cain was entitled to present new testimony on the issue.

"[I]t is improper to argue new matter in a motion for reconsideration." State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct.App. 1999). "It is well settled that an issue may not be raised for the first time in a post-trial motion." SCDOT v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (citing McGee v. Bruce Hosp. Syst., 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996)). Post-trial motions are "used to preserve those [issues] that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998).

In the present case, Cain stated that he sought reconsideration of the PCR court's Order of Dismissal. Rather than seeking the court's alteration or amendment of the order based on the evidence he presented, Cain used the Motion as a vehicle to re-open the record *post mortem* to present additional testimony from a witness which could have been presented at PCR hearing. A post-trial motion for reconsideration is not a vehicle for such action. Therefore, the PCR court improperly considered the testimony of Dr. Pickens Moyd ("Dr. Moyd").

IV. The record is devoid of evidence supporting the PCR court's finding that Counsel was ineffective in failing to present additional medical testimony regarding Cain's surgical procedure.

As noted in the Summary of Facts, Cain's primary defense was alibi. Cain claimed that he was at Johnson's home at the time of the robbery and left with friends to have a key made at a

---

Rule 59(e), SCRCP, as evidenced in responsive pleadings and in the PCR court's order for deposition. At no point in his pleadings does Cain request a new trial.

local hardware store. Cain additionally testified that he could not have run from the scene of the robbery due to a surgical procedure on December 1. (App. p. 289, line 22 – p. 291, line 3; p. 291, line 20 – p. 296, line 22.) During this testimony, medical records including the physician's notes were entered into evidence. Counsel believed that this testimony, especially with the addition of the medical records, was adequate on the issue. Counsel intoned that the case turned on whether the jury found the Reames' and Scott's identification of Cain to be credible. In its Order of Dismissal, the PCR court found that Counsel's presentation of the evidence was not unreasonable. Moreover, the PCR court found that Cain had failed to demonstrate any prejudice from failure to present additional medical expert testimony because no such testimony was presented at PCR hearing. (App. pp. 644-646.)

In his Motion to Reconsider, Cain asked the court to reconsider its decision on this issue, *inter alia,* based on the testimony presented at PCR hearing. As previously noted, the PCR court then permitted Cain to locate and depose an additional witness, Dr. Pickens Moyd ("Dr. Moyd"), over the State's objection. In its order granting relief, the PCR court found the victims' testimony that the young assailants had run from the scene to be an integral part of the case and found that Dr. Moyd's testimony, based on the same notes entered into evidence at trial and his expertise, would have changed the outcome of the trial. (App. pp. 732-745.) The State submits that, even if Dr. Moyd's testimony had been properly submitted, the PCR court's conclusion is without evidentiary support.

In his deposition testimony, Dr. Moyd stated that Cain had undergone a surgical procedure on December 1, 2003, just as Cain had testified and the medical reports reflected at trial. (App. p. 671, lines 1-4.) Dr. Moyd reported that, as evidenced at trial, the procedure was performed to treat an undescended testicle. (App. p. 671, line 8 – p. 6, line 20.) Except for this one "little defect," Cain's pre-operative physical examination showed that he was in "excellent

general physical shape." (App. p. 676, line 11 – p. 677, line 3.) After the procedure, a rubber band sutured to the patient's leg would keep the testicle in place until removed. (App. p. 673, lines 1-4; p. 675, line 1- p. 676, line 10.) Dr. Moyd again saw Cain on December 5, 2003, and found him to be well. (App. p. 688, line 16 – p. 689, line 2.) Cain was convicted of a robbery which occurred on December 18, 2003. Dr. Moyd removed the staples from Cain on December 22, 2003, noting no abnormality or complaints of pain. (App. p. 689, lines 1-6; p. 33, line 11- p. 34, line 11; p. 35, lines 6-22.) Dr. Moyd stated that the band would normally have been removed much sooner. (App. p. 688, lines 8-9; p. 689, lines 18-20; p. 701, line 23 – p. 702, line 3.)

Cain asserted that Dr. Moyd's testimony would cast doubt upon the victims' identification of him as he could not run the short distance from the scene as described by witnesses on December 18, 2003. (App. p. 108, lines 1-4; p. 111, lines 13-21; p. 112, line 3 – p. 113, line 7; p. 125, lines 16-25; p. 126, lines 16-21; p. 133, line 17 – p. 135, line 5; p. 184, line 23 – p. 185, line 5; p. 185, line 22 – p. 186, line 5.) However, when asked whether Cain could have run on December 18 following the procedure on December 1, Dr. Moyd stated he could not say for sure whether Cain ran or how fast, stating:

> ...in my expert opinion you'll have to say he would be very scared to run that fast, but, see, neither you nor I or anybody in this room knows how 'that fast' is because we didn't see it, but apparently [the witnesses said] he was running pretty fast. Following an undescended testicle operation, could he – it would be possible but I think not probable that he would run real hard 18 days after surgery. But he could run seven days after surgery, but 14 days he could run, 18 days, but can he run hard? I don't know. ... He—he could have done that, but it would have been unusual and not likely. However, once you couple with the fact that according to the testimony of some people, he was under a lot of duress, and under those circumstances maybe so, but it would have been hard for him to do. ... I don't know how hard hard is ...Unlikely, but possible.

(App. p. 691, line 18 – p. 694, line 4.) Dr. Moyd continued:

> ...Predicated on the assumption that one side is telling the truth, if he had committed armed robbery, I think his adrenaline would be pumping. We've seen football players play hard with a two bone fracture of the forearm. So teenagers can perform when they're hurting. And I've seen that many times because we did a lot if work for the high school football team here. Actually I probably did almost all of it for a long time.
> So the question can't – could he? *Yeah, he could.* Would it be probable? Well, it just depends on how – his state of mind and his state of excitement, how much his adrenaline was pumping... you can't say probably not but it would hurt him.

(App. p. 697, line 12 – p. 698, line 8.) Dr. Moyd also noted that reactions to surgery would vary from person to person, sharing that his own son had a "very similar procedure" and "was up and about all over the place in a week's time." (App. p. 691, lines 22-25; p. 704, lines 9-20.) Dr. Moyd concluded that while such exertion may be unlikely, it was certainly possible. (App. p. 704, lines 7-8.)

In its order of dismissal, the PCR previously found that Cain had failed to demonstrate prejudice from Counsel's failure to investigate additional witnesses regarding medical testimony:

> ...I further find that Applicant has not demonstrated prejudice in this regard. Applicant offered no expert testimony on the issue of Applicant's physical limitations from the surgery. Therefore, it is merely speculative as to whether expert testimony on the subject would have aided the defense. Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). Davis' testimony at PCR hearing regarding the surgery was largely cumulative to Applicant's own testimony. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). *Finally, Applicant's primary defense was alibi. The issue of whether Applicant could run was, in contrast, a minor one. By Applicant's own testimony, on the day of the robbery, he was able to ride in a car, walk, and visit friends.* For these reasons, I find that counsel was not ineffective in this regard.

(App. pp. 645-646.) [Emphasis supplied.]

The State submits that even if Dr. Moyd's testimony were properly admitted into the PCR record, evidence does not support a finding of prejudice. Dr. Moyd's testimony would not have changed the outcome of trial. Cain testified at trial that he had undergone a surgical

procedure on December 1 and presented documentation to support this claim in the form of reports, the same reports relied on by Dr. Moyd in deposition. In these aspects, Dr. Moyd's testimony was cumulative to that of Cain. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (no prejudice where additional witness testimony would have been cumulative and did not establish alibi); Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (counsel not ineffective in failing to object to police report where contents of report were cumulative to witness testimony at trial).

In other aspects, Dr. Moyd's testimony actually contradicts Cain's testimony at trial. Cain's assertion that he could not run on December 18 was unchallenged at trial; Dr. Moyd's testimony allows for the possibility that Cain could indeed run, especially if under duress from commission of a robbery. In this respect, Dr. Moyd's testimony would actually have an adverse effect, serving to cast serious doubt upon Cain's claim that he was unable to run.

Similarly, corroborative testimony from Cain's mother ("Mother") would not affect the outcome of trial. Mother testified that Cain could not run and could not participate in exercise activities in school. (App. p. 567, line 24 – p. 568, line 5.) This testimony is cumulative to Cain's. (See App. p. 291, line 20 – p. 292, line 1.) However, Mother also testified that Cain could only move in a stooped fashion, bent forward towards his feet, as a result of the surgery while the sutures were in place. (App. p. 569, lines 1-13; see also p. 588, line 17 – p. 589, line 6.) This testimony would be contradicted by Cain's trial testimony that he could ride in a car and visit friends as well as testimony that Cain stood erect outside the vehicle during the identification.

Finally, as stated in the PCR court's original order of dismissal, the issue of whether Cain could run was a minor one in context, far from the central issue.[4] The central issue in the case was one of credibility. The victims, particularly Scott, offered unflappable identification of Cain

[4] As noted by the trial court, "you don't have to be able to run to commit an armed robbery." (App. p. 295, lines 19-20.)

as one of the assailants both in court and out of court. The case was also supported by circumstantial evidence, such as Burke's sighting of Cain and two other boys just before the robbery, apprehension nearby just after the robbery, and Cain changing clothes. Credibility of alibi was central to the defense case, and the additional testimony regarding the surgery does nothing to aid that troubled cause. For all of these reasons, the testimony of Dr. Moyd, even if properly presented, and Mother on the issue would not affect the outcome of trial.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's Order. If this Court grants certiorari, the Petitioner requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: Mary S. Williams
ATTORNEYS FOR PETITIONER

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

March 30, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lee County
The Honorable R. Ferrell Contran, Jr., Circuit Court Judge
Case Number 2008-CP-31-0021

DORIAN CAIN, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

CERTIFICATE OF SERVICE

I, Lauren Meara, certify that I have served the Petition for Writ of Certiorari and Appendix by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

Lauren Meara

LAUREN MEARA
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

March 30, 2011