

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County
Honorable Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-001253

RECEIVED

APR 21 2014

S.C. Supreme Court

RICHARD SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

ASHLEIGH R. WILSON
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Did the lower court properly find trial counsel was not ineffective for failing to request an alibi jury instruction when counsel made a strategic decision not to pursue an alibi defense at trial and the evidence presented was not sufficient to support an alibi jury instruction?

STATEMENT OF THE CASE

For purposes of this Return, the Respondent adopts the Petitioner's statement of the case.

ARGUMENT

There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to request an alibi jury instruction when counsel made a strategic decision not to present an alibi defense at trial and the evidence presented at trial was not sufficient to support a jury instruction based on an alibi.

The Petitioner asserts that the post-conviction relief court erred by finding counsel was not ineffective for failing to request an alibi jury instruction. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 (1984); Butler, 286 S.C. 441.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of 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." Id. 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." Id. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry, 300 S.C. 115.

The Respondent submits the lower court properly held that counsel was not ineffective for failing to request an alibi jury instruction at trial. The Petitioner was convicted of beating Charles Godley to death in his home during a burglary in 1995. (App. 88:1-8). Shortly after the murder, the Petitioner was questioned by police and provided police with information about his whereabouts on the night of the murder. (App. 264:1-21). Police went to the places the Petitioner said he had been and were unable to locate the people the Petitioner said he was with on the night of the murder. (App. 267:5-15, 269:14-270:3).

In 2004, after receiving several leads indicating the Petitioner's involvement in the murder, police set up an undercover operation to meet the Petitioner, gain his confidence, and determine if he had any involvement in the murder. (App. 356:2-7). After several recorded meetings with an undercover officer, the Petitioner confessed to killing a man during a burglary and beating him to death with a hammer in Beaufort, South Carolina. (App. 363:1-7).

The Respondent submits trial counsel was not ineffective for failing to request a jury instruction on an alibi defense at trial. "To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime." State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984) (citing State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980)). It is not enough for

the accused to say that he was not at the scene and must therefore have been elsewhere. Since an alibi derives its potency 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 not an alibi at all. State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980).

Trial counsel articulated a reasonable strategic basis for his decision not to present an alibi defense at trial or request an alibi jury instruction. Counsel testified he decided not to present an alibi defense at trial because the Petitioner's alibi was not a complete alibi and he no witnesses to corroborate the alibi. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984).

"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

At the evidentiary hearing, the Petitioner testified he told police and trial counsel that the night of the crime he was at the Island Plaza where he stayed overnight. He testified he also told

police and trial counsel he was with three other people that night including Reggie Daise and Ms. Betty who worked at the laundromat in the Island Plaza. (App. 474:17-476:2, 485:5-13).

At the Petitioner's evidentiary hearing, counsel testified he decided prior to trial not to pursue an alibi defense because the alibi defense was not complete and he was unable to gather the necessary people to corroborate an alibi defense. (App. 508:22-509:4). Counsel testified he discussed with the Petitioner his alibi because it was mentioned in reports that he had given some information about his alibi to police the day he was brought in for questioning. (App. 487:8-16). Counsel testified the Petitioner gave him information concerning people and he was unable to do anything with the information due to the lapse in time between the murder and the Petitioner's arrest. (App. 487:22-488:3). Counsel also testified that even if the Petitioner's alibi were true, there was still a time open where it was possible the Petitioner could have committed the crime. (App. 498:7-12). Counsel testified that ultimately, he concluded the Petitioner's alibi was uncorroborated and could not be confirmed. (App. 489:11). The Respondent submits in light of counsel's conclusions about his ability to corroborate the Petitioner's alibi and the completeness of the defense, counsel's decision not to pursue the alibi defense at trial was a reasonable strategic decision.

Counsel's decision not to pursue an alibi defense is further evidenced by the fact that the Petitioner presented no evidence, witnesses or testimony in support of his alleged alibi at trial. While alibi is not an affirmative defense imposing upon the accused the burden of its proof, the Petitioner never presented testimony or argument to support his alleged alibi. State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959). All of trial counsel's references to the Petitioner's alleged alibi at trial were made in the context of Petitioner's argument to the jury that police did not conduct a thorough investigation shortly after the murder. (App. 97:6-18, 269:11-271:8,

426:5-18). Counsel even stated during the evidentiary hearing that the Petitioner's alibi did not show the Petitioner could not have committed the murder, but instead showed the police investigation of the murder was done in a very haphazard manner. (App. 503:13-15).

The State's theory of the case also did not focus on the Petitioner's alleged alibi. The State made no reference to the Petitioner's alleged alibi during its opening or closing statements. (App. 87:21-89:16, 407:16-419:8). The State's theory of the case instead focused on the recorded confession of the Petitioner to the undercover officer where he gave details of the murder that were not known to police prior to Petitioner's confession. (App. 417:6-21).

The Respondent submits Court should not consider persuasive counsel's testimony during the evidentiary hearing that looking back, maybe he should have requested the alibi instruction to give the trial court the opportunity to decide if there was sufficient evidence to give an alibi defense. (App. 497:11-15). In Strickland, the United States Supreme Court stated a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, 466 U.S. 668, 689 (1984). Since trial counsel articulated a reasonable strategic basis for not pursuing an alibi defense at trial and the Petitioner's theory of defense was not based on his alibi, counsel could not be found ineffective for failing to request a jury instruction on alibi.

The Respondent also submits the evidence taken as a whole, was not sufficient to raise in the minds of the jury a reasonable doubt as to the Petitioner's presence at the scene of the crime and to warrant an instruction on alibi. The law to be charged must be determined by the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

At the evidentiary hearing, the Petitioner testified he told police he stayed overnight at the Island Plaza the night of the murder. (App. 485:5-13). The Petitioner's alleged alibi as presented at the evidentiary hearing was not sufficient to establish a complete alibi. Petitioner's alibi did not include any time references and he failed to indicate exactly when he arrived at the Island Plaza for the night or when he left the following morning. Based on the alibi presented at the evidentiary hearing, the Petitioner could not have established at trial he was at another specified place at the time the crime was committed and that it was impossible for him to have been at the scene of the crime.

Counsel testified that the problem with the Petitioner's alibi was the timeline of the killing. He testified that even if all the things the Petitioner's told police with regard to his alibi were true, the alibi only excluded one time period and there was still time open where it was possible that the Petitioner could have committed the crime. (App. 498:7-12, 503:7-13).

Counsel also testified that had he requested an instruction on alibi, he did not have any witnesses to present to the court to support his request that would have been able to account for the Petitioner's whereabouts the night of the murder. (App. 497:1-10). The Respondent submits this Court has never required counsel to take actions before the Court which counsel would consider futile. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). The Respondent submits counsel was not ineffective for failing to request a jury instruction on alibi when the Petitioner did not present an alibi defense at trial and the evidence presented at trial did not provide a complete alibi or support a jury instruction on alibi.

Lastly, the Respondent submits no prejudice resulted from trial counsel's failure to request an instruction on alibi because based on the evidence presented at trial, the instruction was not warranted. Even if the instruction had been presented, it is unlikely the instruction

coupled with the sparse evidence presented at trial about the alleged alibi would have been sufficient to overcome the Petitioner's recorded confession to police which included details that were unknown to police until after the Petitioner was questioned by the officer and confessed. (App. 499:1-19).

The Respondent submits there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to request an alibi jury instruction. Trial counsel was not deficient and provided a reasonable strategic basis for his decision not to pursue an alibi defense at trial and the evidence presented at trial was not sufficient to warrant an instruction on alibi. The Respondent submits that the Petitioner was not prejudiced by counsel's performance because even if an alibi instruction have been given at trial, it is unlikely that the limited evidence presented at trial about the Petitioner's alibi would have overcome the Petitioner's detailed confession.

CONCLUSION

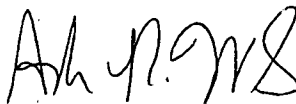
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Perry M. Buckner, Circuit Court Judge

RICHARD SIMMONS

Petitioner,

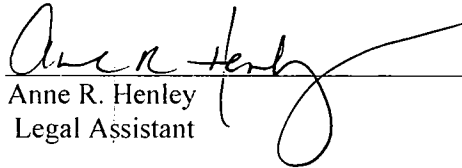
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STATE OF SOUTH CAROLINA,

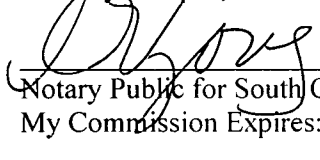
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari To The Court of Appeals has been served upon opposing counsel, Lara Caudy , this 21st day of April 2014.


Anne R. Henley
Legal Assistant

SWORN to before me this
21st day of April, 2014.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 10/28/2014



ALAN WILSON
ATTORNEY GENERAL

April 21, 2014

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APR 21 2014

S.C. Supreme Court

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

RE: Richard Simmons v. State of South Carolina
Appellate Case No. 2013-001253

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari to the Court of Appeals in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Lara Caudy, Esquire