

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County
J. Derham Cole, Circuit Court Judge

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JUN - 4 2014
S.C. Supreme Court

KENYAL L. ROGERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000547

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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 plea counsel was ineffective in failing to pursue an alibi defense?

STATEMENT

On January 27, 2009, petitioner appeared before the Honorable Roger L. Couch in Cherokee County and pled guilty to voluntary manslaughter. A thirty (30) year sentence was imposed. Thomas E. Shealy, Esquire, was plea counsel. Michael Morin, Esquire, was the assistant solicitor. (App. p. 1 – p. 27).

Petitioner filed an application for post-conviction relief on December 10, 2010. (App. p. 28 – p. 37). Respondent filed a return dated November 1, 2011. (App. p. 38 – p. 42). An evidentiary hearing was held on October 4, 2013, before the Honorable J. Derham Cole. Petitioner was present and proceeded pro se. Respondent was represented by Suzanne H. White, Assistant Attorney General. Petitioner testified in his own behalf and called Angela Rogers and plea counsel to testify. (App. p. 43 – p. 119). On February 19, 2014, Judge Cole issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 120 – p. 130)

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to pursue an alibi defense.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudice by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, hearsay, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006). Failing to properly investigate may lead to a claim of ineffective assistance of counsel. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009). And counsel may be alleged ineffective for failing to fully cross-examine a witness. State v. Nance, 393 S.C. 289, 712 S.E. 2d 446(2011); Kirkpatrick v. State, 306 S.C. 359, 412 S.E. 2d 389(1991).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E. 2d 878 (2006).

In this case, petitioner pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970). (App. p. 4, lines 8 – 10). Petitioner testified at the evidentiary hearing that he had an alibi defense, but counsel never followed up on that defense. In State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980), the Court wrote:

A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act. Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission.

In Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992), a defense attorney was ineffective for failing to request an alibi charge. The Court wrote that “the absence of a charge on alibi gave rise to a conclusion by the jury that it was impossible for them to consider alibi as a defense.” In two other cases, defense attorneys were held ineffective in failing to request an alibi charge. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994).

If counsel in this case would have pursued an alibi defense, he would have had the benefit of an alibi charge. He was ineffective in failing to pursue an alibi defense.

CONCLUSION

Petitioner's writ should be granted.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

KENYAL L. ROGERS,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000547

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenyal L. Rogers 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 October 4, 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 Kenyal L. Rogers.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of June, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County
J. Derham Cole, Circuit Court Judge

KENYAL L. ROGERS,

PETITIONER,

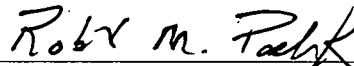
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Kenyal L. Rogers, #332892, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 4th day of June, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of June, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.