

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Aiken County

Edgar W. Dickson, Circuit Court Judge

THADDEUS CURRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000839

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Did trial counsel's failure to present Petitioner's alibi witnesses and alibi defense violate Petitioner's right to the effective assistance of counsel where witnesses were prepared to testify that Petitioner was in another state when the shooting occurred?

STATEMENT

On May 6, 2004, the Aiken County grand jury indicted Petitioner for possession of a firearm or knife during the commission of a violent crime (2004-GS-02-0838) and murder (2004-GS-02-0839). App. 794-795; App. 797-798. The state called the case to trial on May 10, 2014 before the Honorable Reginald I. Lloyd and a jury. Michael Chesser represented Petitioner, and Everett Chandler and Bill Weeks represented the state. App.1. The jury found Petitioner guilty as charged. App. 360, lines 5-16. Judge Lloyd sentenced Petitioner to life imprisonment for murder and to five years' imprisonment to be served consecutively for the weapon charge. App. 371, lines 2-5; App. 796; App. 799.

Petitioner filed a timely notice of appeal, which was perfected by Robert M. Dudek. App. 375-401; App. 424-430. Jeffrey A. Jacobs represented the state on appeal. App. 402-423. A divided panel of the Court of Appeals affirmed Petitioner's conviction and sentence in a published opinion on October 9, 2006. App. 431-458. Petitioner filed a petition for rehearing on December 21, 2006. App. 458-464. The petition for rehearing was denied on February 5, 2007 with the Honorable Ralph King Anderson, Jr. dissenting. However, the original opinion was withdrawn and a new opinion substituted. App. 467-493; State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Petitioner sought review in this Court on May 7, 2007. App. 494-520. Donald J. Zelenka, representing the state, filed a return to the petition for writ of certiorari. App. 521-543. On April 3, 2008, this Court denied review. App. 544-546. On April 4, 2008, the remittitur was issued. App. 546.

Petitioner filed an application for post-conviction relief (PCR) on July 24, 2008 (2008-CP-02-1271). App. 547-558. On January 29, 2010, the matter proceeded to an evidentiary hearing before the Honorable W. Jeffrey Young. William Sussman represented Petitioner, and

Mary Williams represented the state. App. 565. The parties re-convened on July 14, 2010. App. 630. By an order filed on October 8, 2010, Judge Young denied Petitioner relief. App. 751-762. On October 29, 2010, Petitioner filed a timely pro se notice of appeal. App. 763-765. On December 22, 2010, this Court dismissed the appeal due to Petitioner's failure to request the transcript timely. App. 766-767. Remittitur was issued on January 7, 2011. App. 768.

On December 5, 2011, Petitioner filed an application for PCR (2011-CP-02-2719). App. 769-777. On January 22, 2014, the matter proceeded to a hearing before the Honorable Edgar W. Dickson. Lance Boozer represented Petitioner, and Daniel Gourley represented the state. App. 784. By an order filed April 14, 2014, Judge Dickson granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 790-793.

Petitioner filed a timely notice of appeal. This certiorari petition follows.

ARGUMENT

Trial counsel's failure to present Petitioner's alibi witnesses and alibi defense violated Petitioner's right to the effective assistance of counsel where witnesses were prepared to testify that Petitioner was in another state when the shooting occurred.

Relevant facts

Trial evidence

On the evening of March 17, 2003, Heath Hamilton, the deceased, and Ronald Coursey were drinking beer and smoking marijuana. The two decided to get some marijuana so they could sell it. They travelled to Savannah West Apartments in Augusta, Georgia to buy the marijuana. App. 102, line 14 – App. 103, line 10. There, they met with Anthony Savage, Jeremy Simuel, and Petitioner. App. 103, lines 17-24; App. 162, lines 1-18; App. 205, line 1 – App. 206, line 2. There was no marijuana for sale at the time, but they agreed to meet at a gas station in Aiken for the drug transaction later. App. 105, lines 9-25; App. 206, lines 2-7; App. 206, lines 17-20; App. 208, lines 18-24. Savage gave his phone number to the deceased, who wrote it on his hand. App. 106, lines 1-6; App. 156, lines 18-21; App. 159, lines 12-23; App. 206, line 20 – App. 207, line 4. Coursey and the deceased continued to smoke marijuana as they waited for the drug deal to occur. App. 106, lines 11-16.

Simuel drove Savage and Petitioner to a spot near the gas station early in the morning of March 18, 2003. App. 164, lines 16-18; App. 165, lines 18-24; App. 169, lines 1-4; App. 170, lines 21-23; App. 171, lines 17-25. According to Simuel, Petitioner said he was going to “get that money” during the ride to Aiken. App. 169, lines 17-24. However, Simuel denied there was any plan to rob the deceased. App. 176, lines 14-21. According to Savage, he intended to get the money from the deceased and Coursey and use it to buy the marijuana for them. App. 209, lines 1-

3. Petitioner and Savage walked to the gas station while Simuel stayed behind in the car. App. 171, line 23 – App. 172, line 2; App. 210, lines 2-13; App. 216, lines 6-7.

Petitioner and Savage met with Coursey and the deceased in a dark alley beside the gas station. Petitioner and Savage were on foot, while Coursey and the deceased were in a truck. App. 108, lines 4-16; App. 123, lines 4-9; App. 211, lines 13-15; App. 212, lines 15-16. Coursey claimed Savage and Petitioner demanded to see the money before producing the drugs. When the money was not produced, they became aggressive. App. 107, line 24 – App. 108, line 1; App. 109, lines 8-10. According to Coursey and Savage, Petitioner began shooting toward the deceased's truck. App. 109, lines 15-22; App. 215, lines 11-24. Despite the darkness in the alley, Coursey claimed he was certain that Petitioner was wearing “a white t-shirt, a wife beater or tank top shirt” and was the shooter. App. 109, line 23 – App. 110, line 3; App. 111, lines 5-6.¹ Realizing the deceased had been shot, Coursey opened the driver's side door, pushed the deceased to the other side, drove to another gas station, and called the police. App. 112, lines 8-16.

Simuel claimed that Petitioner returned to the car within three minutes of leaving. Petitioner made comments such as “I ain't no joke.” App. 172, lines 4-19; App. 216, lines 2-14; App. 214, line 5 – App. 217, line 6. Simuel and the others left the area. App. 173, lines 3-14; App. 217, line 13. Simuel described Petitioner as wearing a pair of blue pants, a shirt that resembled a jersey, and a brown starter jacket. App. 174, lines 19-24; App. 184, lines 13-17. Similarly, Savage described Petitioner as wearing a brown start jacket, a white shirt with a Yankees emblem on it, and blue

¹ When Coursey called 911, he told the dispatcher that he and the deceased stopped at Bryant's to use the phone, which was not completely true. App. 135, lines 17-22. Further, Coursey was unable to describe the shooter at all. App. 136, line 15 – App. 137, line 3. When law enforcement arrived, Coursey was unable to give a description of the shooter. App. 138, lines 2-11; App. 139, lines 3-6. Later, when Coursey spoke to a detective, he stated the shooter had on a white t-shirt. App. 139, lines 12-25.

jeans. App. 209, lines 13-18; App. 224, lines 9-16. Although Savage claimed at trial that he was wearing a blue button down shirt at the time of the shooting, he told the detective, just days after the shooting, that he was wearing a “white tank top t-shirt.” On cross-examination, he attempted to explain the obvious inconsistency – and obviously incriminating fact - by saying that he was wearing a white tank top t-shirt under his blue shirt. App. 209, lines 4-8; App. 230, line 4 – App. 231, line 1; App. 300, lines 9-25. Simuel, who was later charged with murder, armed robbery and possession of a firearm concerning his involvement with the death of the deceased, was questioned by the police the following day. However, Simuel did not mention Petitioner or Aiken when he talked to the police. App. 175, lines 5-14; App. 176, lines 1-9; App. 179, line 23 – App. 181, line 23; App. 183, line 9 – App. 184, line 5. Savage was also charged with the murder. App. 221, lines 13-18; App. 227, line 19 – App. 228, line 1.

In his opening statement, trial counsel told the jury that the issue before it was “who pulled the trigger out there at Bryant’s Gas Station.” App. 100, lines 7-8. During his closing argument, trial counsel argued the “evidence would tend to show that Antonio [sic] Savage shot Heath Hamilton in the early morning hours of March 18, of 2003.” App. 316, lines 4-7. He emphasized the testimony of Coursey that the shooter wore a “white t-shirt, tank top t-shirt” coupled with Savage’s statement to the investigator that Savage had on a “white tank top t-shirt.” App. 317, lines 3-15. He attacked Coursey’s identification of Petitioner as the shooter based on Coursey’s ingestion of alcohol and marijuana, the darkness of the location, and the shortness of time in which the shooting occurred. App. 318, line 3 – App. App. 320, line 9. Trial counsel attacked Savage’s testimony due to his bias of wanting to avoid a harsh sentence, the strong evidence indicating he was the shooter, and his prior criminal record. App. 320, line 10 – App. 321, line 21.

Finally, trial counsel argued that the shooting was “beyond the scope of any agreement, any plan that had been contemplated.” He told the jury to consider “whether this killing was a natural or probable consequence of a prior plan.” He argued the killing was instant and done by Savage. App. 322, lines 8-25.

In contrast, the solicitor argued that the prosecution was not required to prove Petitioner “was actually the shooter.” According to the solicitor, “the fact of the matter [was] that there were three murderers.” He based this argument on “the hand of one, hand of all” theory. App. 331, lines 3-12. The solicitor argued that the plan was to rob – “Tell me what happens when you bring a gun instead of dope to a dope deal?” He explained that “[i]f you bring a gun instead of the dope to a dope deal, somebody’s going to get shot and the natural consequences, ladies and gentlemen, is that somebody is going to get killed.” App. 331, line 22 – App. 332, line 6. He argued that “no matter how you look at it, [Petitioner] is a cold-blooded murderer.” App. 332, lines 15-16.

PCR evidence

Petitioner first met with trial counsel shortly after his arrest. App. 573, lines 18-22. During this meeting and in subsequent meetings, Petitioner informed trial counsel that he had an alibi. App. 576, lines 21-25; App. 621, lines 8-12. On March 17, 2003, St. Patrick’s Day, Petitioner was with his mother in Georgia until at least 8 p.m. Thereafter, Petitioner went with Margie Darden to a liquor store and Food Lion, where Petitioner’s sister, Valerie Felicia Curry, worked. App. 571, lines 20-25; App. 574, lines 5-25. Petitioner and Darden then went to Darden’s apartment in Georgia for a St. Patrick’s Day party. App. 575, lines 19-23; App. 660, lines 12-17. Sister joined them when her shift ended. Petitioner remained at Darden’s until at least 2 a.m. App. 576, lines 10-18; App. 625, line 24 – App. 626, line 4; App. 649, lines 10-12. Although Petitioner advised trial counsel of his alibi, trial counsel failed to call any of the witnesses. App. 577, lines 8-9; App. 578, lines 2-9;

App. 592, lines 12-17; App. 601, lines 16-17; App. 601, lines 20-23; App. 615, lines 22-25; App. 622, lines 2-9; App. 639, line 23 – App. 640, line 22; App. 645, lines 4-7; App. 645, lines 13-15; App. 648, lines 5-23.

Petitioner's mother, Evonne Fraraccio, testified that on March 17, 2003, Petitioner was with her until about 8 p.m. when he left with Darden to attend a St. Patrick's Day party. App. 650, line 10 – App. 653, lines 25. Between 9:30 p.m. and 10 p.m., Petitioner and Darden returned briefly to deliver some food to her. App. 654, lines 10-17. After they left for the second time, she went to sleep. At 1 a.m., Sister called to let her know that she and Petitioner would be returning home soon. App. 654, line 21 – App. 655, line 3. When Mother awoke the next morning at 10 a.m., Petitioner and Sister were at home. App. 655, lines 4-9.

Sister also testified in support of Petitioner's alibi. She recalled working at Food Lion on March 17, 2003 when Petitioner and Darden shopped there. App. 656, lines 12-18. When she left work between 11 p.m. and 11:30 p.m., she went to Darden's to join the party. App. 657, lines 3-11. Petitioner was there when she arrived and remained there until the two of them went home around 3 a.m. App. 657, line 12 – App. 658, line 4; App. 658, lines 17-19; App. 659, lines 8-12. During the party, Petitioner used her phone to call his girlfriend. App. 658, lines 7-16. Sister also confirmed she called Mother around 1 a.m. to say they would be home soon. App. 658, lines 20-23. Although trial counsel's investigator interviewed her and she confirmed Petitioner's alibi, trial counsel did not call her as a witness. App. 659, lines 18-23. When trial counsel's investigator interviewed her, she admitted she fell asleep for a very short time around 1:30 a.m. App. 659, line 24 – App. 660, line 5.

Additionally, Petitioner's girlfriend, Charlette Broadwater, testified that when she was dating Petitioner in 2003, Petitioner and she were together ninety-five percent of the time. If the two were apart, Petitioner would call her to let her know where he was going and what he was

doing. App. 661, line 9 – App. 662, line 25. Although she could not say with absolute certainty that she spoke to Petitioner on March 17 and March 18, she confirmed that Petitioner typically called her around midnight. App. 663, lines 1-4; App. 663, lines 11-19. This was consistent with Sister’s testimony regarding Petitioner calling his girlfriend. However, trial counsel never contacted Broadwater prior to the trial. App. 663, lines 5-10.

Trial counsel admitted Petitioner advised him of his alibi very early in the representation. App. 669, lines 13-19; App. 694, lines 18-20. Trial counsel hired an investigator to assist him with the case. App. 577, lines 1-5; App. 669, lines 20-23. When the investigator interviewed Darden, she claimed Petitioner was not with her on March 17-18, 2003; however, trial counsel was unable to recall if he spoke directly to Darden. App. 670, lines 6-11; App. 671, lines 17-18; App. 695, lines 23-25; App. 708-710. In trial counsel’s opinion, Darden’s testimony was necessary for Petitioner’s alibi. App. 671, line 24 – App. 672, line 4. Although Sister confirmed the alibi to the investigator, trial counsel was of the opinion that he could not present an alibi without Darden. App. 672, lines 5-12; App. 683, line 13 – App. 684, line 3; App. 694, lines 18-20. Instead of presenting Petitioner’s alibi, trial counsel chose to challenge the state’s case that Petitioner was the triggerman. Trial counsel tried to use inconsistent statements by the witnesses to discredit them. His hope was to convince the jury that Savage was the shooting and that Petitioner was there only to rob the deceased and Coursey. App. 673, line 8 – App. 674, line 3.

Order denying PCR

After summarizing the testimony of Petitioner, his alibi witnesses, and trial counsel, the PCR judge found trial counsel’s “actions were reasonable based on the information he obtained from his investigation.” App. 759. According to the PCR judge trial counsel “reasonably believed that the alibi would fail absent corroboration, and it would certainly fail if an alibi witness

contradicted the alibi.” App. 759. Further, the PCR court found Petitioner failed to demonstrate prejudice because “[t]he alibi set forth by [Petitioner], Mother, Sister, and Broadwater lack[ed] credibility.” App. 759. The PCR judge concluded “the testimony of these three witnesses failed to establish an alibi defense,” which requires a defendant to “present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime.” App. 759. According to the PCR judge, “[t]he testimony of Mother, Sister, and Broadwater would not have constituted an alibi defense because none of them could definitely account for Petitioner’s whereabouts during the time the crime was committed.” App. 759 (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)).

Discussion

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

Without question, a trial attorney “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). “One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable.” Id. This Court has held that if trial counsel articulates a valid reason for employing certain strategy and the strategy used satisfies an objective standard of reasonableness, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker’s girlfriend regarding Walker’s whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker’s girlfriend testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend’s “testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her.” Id. at 407, 756 S.E.2d at 147. Thus, “it would be physically impossible for Walker to have committed the kidnapping and assaults.” Id. at 406, 756 S.E.2d at 147.

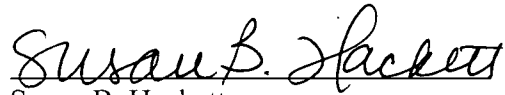
Trial counsel’s failure to present Petitioner’s alibi witnesses and defense violated Petitioner’s right to the effective assistance of counsel. Trial counsel was aware of Petitioner’s alibi and initiated an investigation into the alibi. However, trial counsel failed to present the alibi

because one witness did not confirm the alibi. Counsel was aware that Sister supported the alibi, but refused to present her testimony. Trial counsel conducted no further investigation of the alibi, such as interviewing Mother and Broadwater, who provided key corroboration to the alibi through the phone calls and observations. Further, counsel never interviewed Darden or even attempted to speak with her. Although she told the investigator that Petitioner was not with her, trial counsel failed to speak with her personally to ensure she was being truthful in her denial. Trial counsel's failure to present the alibi witnesses and defense denied Petitioner his right to the effective assistance of counsel.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan B. Hackett".

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Edgar W. Dickson, Circuit Court Judge

THADDEUS CURRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

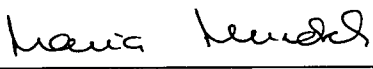
I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, via U.S. First Class Mail with the appropriate postage affixed thereto, and Mr. Thaddeus Curry #301924, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of December, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.