STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2013-001864

Albert Santanio Kelly,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Did trial counsel provide ineffective assistance, in violation of Petitioner's Sixth and Fourteenth Amendment rights, by failing to request an alibi instruction despite having presented evidence of an alibi and arguing to the jury that Petitioner should not be convicted based upon his alibi where the evidence strongly pointed to the guilt of another?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the August 2004 term of General Sessions for murder (2004-GS-23-5966) and at the July 2005 term for armed robbery (2005-GS-23-2024, count 1) and possession of a weapon during commission of a violent crime (2005-GS-23-2024, count 2). (App.pp.831-32; pp.834-35). C. Timothy Sullivan, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On October 12, 2005, the Honorable G. Edward Welmaker sentenced Petitioner to consecutive terms of 45 years for murder, 15 years for armed robbery, and 5 years for possession of a weapon during commission of a violent crime. (App.pp.596-97; p.833; pp.836-37).

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[1] brief. (App.pp.599-609). The Court of Appeals dismissed the appeal. State v. Kelly, Op. No. 2008-UP-530 (S.C. Ct. App. filed Sept. 11, 2008). (App.pp.610-11).

Petitioner filed an application for post-conviction relief (PCR) on September 25, 2008 (2008-CP-23-7212).[2] (App.pp.612-49). A hearing was held at the Greenville County Courthouse on November 15, 2010. (App.pp.721-44). Petitioner was present and represented by Elizabeth P. Wiygul, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B.

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[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).
[2] Petitioner subsequently filed several pro se amendments. (App.pp.655-720).

Stilwell denied relief in an order filed February 1, 2011. (App.pp.747-53).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective in not requesting an alibi instruction.

Petitioner argues trial counsel rendered deficient performance because he did not request the trial judge issue an alibi charge to the jury. As this allegation is without merit, certiorari is not warranted in this case.

A.

State's case

The victim was killed in the early morning hours of February 27, 2004. At trial, a forensic pathologist testified the victim died from a single gunshot wound to the right side of the face. (App.pp.194-95; p.200). The victim's neighbor testified he heard a shot and saw two black men running from the victim's body. (App.pp.88-89). The victim's brother testified he had seen the victim earlier in the day and that he was going to cash three paychecks. (App.pp.98-99).

Marcus Parks testified he, Petitioner, and Shaundrecus Edwards discussed robbing

someone for a car and then going to rob someone else. (App.pp.126-27). Parks testified he got a .22 pistol from Edwards and that Petitioner had a .380 pistol. (App.p.127; p.130). Parks testified he and Petitioner went to a trailer park around 12:30 a.m. and came across the victim. (App.pp.131-34). Parks testified Petitioner threw the victim to the ground and patted him down and then shot him. (App.pp.134-35). Parks testified they ran back to Edwards' house and Petitioner wiped down his gun and put it under a couch. (App.pp.136-37; p.140). Parks testified he did not see whether Petitioner stole anything. (App.p.140). Parks testified he told police about this incident after he was arrested. (App.pp.144-45).

Shaundrecus Edwards confirmed Parks and Petitioner were at his house that day and that they all discussed committing a robbery. (App.p.152; p.157). Edwards confirmed Parks had his .22 pistol and Petitioner had a .380 pistol when they left his house, but that he did not leave with them. (App.pp.157-59). Edwards confirmed Parks and Petitioner returned to his house later. (App.p.162).

Two sets of footprints in the snow led away from the crime scene, and one set went to Edwards' home. (App.pp.263-67). The .22 pistol was collected at Edwards' home. (App.pp.268-70; pp.314-15; p.325). The .380 pistol which was subsequently collected at Edwards' home after Parks told officers of its location. (App.pp.314-16; p.326).

A former Dekalb County patrol officer encountered Petitioner in the early morning hours of May 10, 2004 and stated Petitioner gave him a false name. (App.pp.237-39; pp.244-45). After Petitioner consented to a search of his vehicle, a

loaded .380 pistol was found, which Petitioner stated was his. (App.pp.245-46). After being confronted about the false name, Petitioner gave the following spontaneous statement: "I'm going to be honest. My name is [Petitioner] . . . and I'm wanted out of Greer, South Carolina for murder, because I shot a guy in the back of the head and I have been running ever since." (App.p.248). A Greer Police Department investigator interviewed Petitioner in Dekalb County and Petitioner signed a statement that he and Edwards went to rob the victim, the victim fought with him, and "the gun went off."[3] (App.pp.328-41).

A SLED agent testified as an expert in firearm and tool marks identification and stated the recovered bullet and .380 caliber cartridge case were fired from the .380 Highpoint pistol. (App.pp.307-13).

Defense's case

Petitioner stated he went to Edwards' house to get a haircut on February 26, 2004 and that Parks was there. (App.pp.404-05). Petitioner stated Edwards showed him both the .22 and .380 Highpoint pistols. (App.p.406). Petitioner stated Edwards and Parks took the guns and that Edwards said he and Parks "have got some business we got to handle" and that the two of them walked away. (App.pp.406-07). Petitioner stated he went home and saw his mother. (App.pp.407-08). Petitioner stated he went to Georgia for job interviews on the evening of February 27th. (App.pp.408-10). Petitioner confirmed his encounter with the Dekalb County officer but stated the .380 pistol found

[3] Petitioner also said in his statement that he and Edwards ended up with $700 and that Edwards disposed of the victim's wallet. (App.p.341).

was his friend's but that he took responsibility for it because his friend was on probation. (App.p.412). Petitioner confirmed he gave the officer a false name and that he subsequently gave his real name and stated "I'm wanted in Greer, South Carolina for murder, because they said I shot a guy in the back of the head." (App.pp.412-14). Petitioner disputed the veracity of his written statement and said the police officers told him what to write. (App.pp.416-17).

Leon Irby stated he was awoken by a police officer on the morning of February 27, 2004 because footprints in the snow had been traced to his house. Irby stated he told the officer that Parks and Edwards had stopped by for a drink (possibly between 11:00 p.m. - 12:00 a.m.). (App.pp.375-78). Irby testified on cross-examination that he called Edwards' mother right after the officer left, and that his phone records indicated he called her at 3:29 a.m. (App.pp.381-82).

Joyce Gordon – Petitioner's mother – stated Petitioner left the house at 10:00 p.m. on February 26, 2004 and returned at 11:00 p.m. Gordon stated Petitioner went to bed at 12:30 p.m. and was still in his room when she went to bed at 2:00 a.m. (App.pp.384-85).

A SLED agent testified as an expert in collection and analysis of trace evidence and stated there was gunshot residue on a Braves jacket.[4] (App.p.468).

A different SLED agent testified as an expert in gunshot residue and stated Edwards had gunshot residue on his hands. (App.pp.478-79). This expert admitted on cross-examination that gunshot residue that landed on something like a jacket would

[4] Parks and Edwards had previously testified this was Edwards' jacket but that Petitioner had borrowed it, worn it during the murder, and then returned it. (App.p.141; p.153; p.164).

remain there until something "takes it away." (App.p.482).

Charge conference

After the defense rested its case there was a charge conference. When the trial judge asked trial counsel if he wanted jury charges for self-defense or alibi, trial counsel responded "this is all or nothing. No self-defense. If we believe – if the jury believes his story, then he's not guilty. If they believe the other side, then he's guilty. It's just one shot at murder or not – either guilty or not guilty." (App.p.489).

B.

At the PCR hearing, Petitioner argued Joyce Gordon (his mother) was his alibi. (App.p.728). Petitioner argued, however, that trial counsel did not request an alibi jury charge. (App.pp.729-30).

Trial counsel testified the first trial on these charges resulted in a six-six hung jury. (App.p.739; p.741). Trial counsel testified he did not recall why he did not request an alibi instruction but stated "I thought this case, the way it was presented, that he was going to be found guilty or not guilty of it. I guess we had some hope from the six/six hung jury." (App.p.743).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have requested an alibi charge." The PCR judge found "trial counsel made a strategic decision not to ask for an alibi charge." (App.p.752).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel,

he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective in not requesting an alibi instruction. The PCR judge properly found trial counsel could not be deficient in this regard because the decision not to request an alibi instruction was based upon trial strategy. Trial counsel enunciated this trial strategy during the charge conference when he stated the defense strategy was "all or nothing." Trial counsel expanded upon this at the PCR hearing when he stated he was hopeful this strategy would be successful because the jury was split six-six when Petitioner's first trial ended in a mistrial. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will

be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). In light of Petitioner's testimony refuting both his participation in the murder and the content of his statement and the fact that Petitioner's first trial ended in a mistrial, it was eminently reasonable for trial counsel's strategy to have been an "all or nothing" approach. As such, trial counsel's performance was not deficient because he did not request an alibi instruction.

Regardless, Petitioner cannot prove he was prejudiced by the lack of an alibi jury instruction in this case. Initially, it should be noted his mother testified that he was home the night of the murder. In returning a guilty verdict, however, the jury obviously did not find her testimony (coupled with Petitioner's) to be credible. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is "the finder of fact and weigher of credibility"). It is clear that, regardless of trial counsel's arguments and theory of the case, the jury simply did not accept Petitioner's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired).

Further, Petitioner cannot demonstrate prejudice because the State presented overwhelming evidence of his guilt. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d

344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Parks testified Petitioner shot the victim during a robbery. Petitioner told the Dekalb County officer that: (1) he was wanted for murder, (2) he "shot a guy in the back of the head and [he had] been running ever since," and (3) the .380 Highpoint pistol in his car belonged to him. Petitioner gave a voluntary statement to police in which he admitted to shooting the victim (though he subsequently testified this statement was not truthful). The jacket Petitioner was wearing during the murder testified positive for gunshot residue. The .380 Highpoint pistol recovered in Petitioner's car in Dekalb County was examined and determined to be the murder weapon. Petitioner's story at trial – that his statement to police was coached and the .380 pistol belonged to his friend – is simply not credible. In light of this overwhelming evidence against him, Petitioner cannot prove he was prejudiced by the lack of an alibi jury instruction. See Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172,

174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari Pursuant to Austin v. State. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

December 31, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2013-001864

Albert Santanio Kelly, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari Pursuant to Austin v. State upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, 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. This 31st day of December, 2014.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

December 31, 2014

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

Re: Albert S. Kelly v. State of South Carolina
Appellate Case No: 2013-001864
Lower Court Case No: 2012-CP-23-4466

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Return to Petition for Writ of Certiorari Pursuant to Austin v. State in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services Counselor