STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

RUSTY DUNBAR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000565

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1. Was trial counsel ineffective for eliciting testimony on cross examination from a state's witness about Petitioner's drug use which opened the door to state's evidence against him on this issue after trial counsel had successfully objected to any mention of such; this was prejudicial to Petitioner as the state focused on Petitioner's need for drugs as a motive for the crime?

2. Was trial counsel ineffective for not requesting a jury charge on alibi when two witnesses corroborated Petitioner's testimony that he was at his brother's house when the crime occurred?

STATEMENT

In January 2009, the Aiken County Grand Jury indicted Rusty Dunbar on the charges of kidnapping, burglary first degree, armed robbery (AR), and possession of a knife during the commission of a violent crime. On December 15-17, 2009, Dunbar proceeded to trial before the Honorable Doyet A. Early, III, and a jury. Dunbar was represented by M. Justin Mims and De Grant Gibbons. The state was represented by Elizabeth B. Young. App. 1. The jury returned a verdict of guilty on all four charges as indicted. Judge Early sentenced Dunbar to thirty years each on the kidnapping, burglary first degree, and AR. The sentence on the possession of a knife was five years. All sentences were to run concurrent. App. 503, ll. 8 – 25. Dunbar filed a notice of appeal which was perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina court of Appeals dismissed the appeal. State v. Dunbar, Op. No. 2012-UP-093 (Ct. App. filed February 22, 2012). App. 681.

On March 29, 2012, Petitioner Dunbar filed an application for post-conviction relief (PCR). The state filed a return on June 25, 2012. Dunbar filed an amended PCR application on June 28, 2013. An evidentiary hearing was held on July 10, 2013 before the Honorable R. Ferrell Cothran, Jr. Dunbar was represented by Brett Lancer, and the state was represented by Megan E. Harrigan. App. 548. On March 7, 2014, Judge Cothran issued an order denying Dunbar's PCR application and dismissing it with prejudice. App. 680 – App. 691. Dunbar's attorney filed a notice of appeal. This petition follows.

ARGUMENT

1

Trial counsel was ineffective for not requesting a jury charge on alibi when two witnesses corroborated Petitioner's testimony that he was at his brother's house when the crime occurred.

On October 7, 2008, in the early morning hours Daniel Hynes was awakened when two men kicked in his front door held a knife to his throat with his face pointed down so that he did not see their faces. However, he recognized the voice of Chris Herndon whom he knew. The men robbed his home, and tied him with cords. The men then took his car and left. The car was found abandoned later that night. The bloodhound Tracking Team was called and Chris Herndon came out of the woods and surrendered. He confessed and implicated Rusty Dunbar as the other man. App. 38, ll. 11 – App. 43, ll. 25.

Chris Herndon, co-defendant of Dunbar, testified that he and Dunbar and Jerry Thornton drank beer and liquor all during the day of October 6, 2008 starting about that morning. They picked up Dunbar and his girlfriend to help them sell the rented cement mixer. App. 177, ll. 25 – App. 181, ll. 22. They finally sold the mixer and bought some crack. He, and Dunbar and Thornton smoked the crack. App. 184, ll. 17 – App. 187, ll. 22. They went to Laura Smith's father's house and drank more beer. They left around twelve o'clock that night. They decided to rob Daniel Hynes' house. Thornton dropped them off to find drugs in Hynes' house. They robbed the house and tied Hynes with cords and took his car. When the police spotted them, they abandoned the car. Herndon surrendered and confessed and implicated Dunbar. App. 189, ll. 1- App. 205, ll. 17.

Rusty Dunbar testified in his own defense at trial. He explained the drinking all day, and how Thornton and Herndon wanted to buy the drugs. He told of his use of crack and marijuana. However, his testimony was that when they left Laura Smith's father's house, Thornton and

Herndon dropped Dunbar and his girlfriend, Laura, at Thomas Dunbar's house, Rusty's brother, at about eleven or eleven thirty as the news was still on. Dunbar and Laura decided to spend the night. However, Dunbar could not sleep so he went to his car which was parked in the yard because it did not work, and smoked crack. Thornton appeared and wanted Dunbar to alibi for him about the evening. Dunbar denied being at Daniel Hynes' house at any time that night. App. 392, ll. 11 - App. 407, ll. 22.

Thomas, "Tommy," Dunbar, Petitioner's brother, testified that on October 6, 2008, Rusty and his girlfriend, Laura, came to Thomas's house between eleven and eleven thirty that night. He remembered because he was watching the evening news when they arrived. Thomas went to bed about one o'clock in the morning and Rusty was there the entire time. App. 362, ll. 1 – App. 365, ll. 13.

Laura Smith testified that she was in a relationship with Rusty Dunbar and they had a ten month old baby. At the time of this incident, she was four months pregnant. Her testimony corroborated Petitioner's. She and Rusty Dunbar spent the day with Jerry Thornton and Chris Herndon. They sold the cement mixer because Thornton did not have the money to pay Dunbar and Herndon for their work. She told of the men buying drugs and smoking it. When they left her father's house about ten thirty that night, they went to Bull's Bar. Then Herndon and Thornton dropped her and Rusty at Thomas Dunbar's house after they left Bull's Bar. App. 365, ll.25 – App. 376, ll. 23.

In her closing argument to the jury, the solicitor argued that the two alibi witnesses, Laura Smith and Thomas Dunbar, were not credible. She argued that Laura was young with a baby and dependent on Dunbar. App. 460, ll. 25 – App. 462, ll. 25.

The solicitor argued that Thomas Dunbar was inconsistent in his testimony because it was not possible that Rusty was in his sight the entire time. And Rusty was his baby brother . App. 460, ll. 25 – App. 463, ll. 23.

Before closing arguments, the trial judge asked the two attorneys if they had any specific jury charges "other then the normal." Defense counsel said he would not add anything. App. 431, ll. 21 – App. 432, ll. 11. The trial judge therefore did not charge the jury on alibi. App. 475, ll. 9 – App. 489, ll. 6.

At his PCR hearing, Dunbar testified that his trial counsel was ineffective for not requesting that the judge charge the jury on alibi since there were two witnesses who testified providing an alibi for Dunbar. The state argued against the alibi defense in her closing argument. Dunbar believed that the jury thought they could not consider his alibi defense after the solicitor argued strongly against it and then the judge did not give the jury a charge on alibi that they could consider it. App. 559, ll. 3 – 562, ll. 21.

Defense counsel testified at the PCR hearing that he presented the defense of alibi at Dunbar's trial. Two defense witnesses testified giving Dunbar an alibi. Counsel admitted that he did not know why he did not ask for an alibi instruction. His only thought was because Dunbar vacillated about whether to present the alibi defense until he decided at the last minute that he wanted the alibi defense, He had advised Dunbar not to use the alibi defense but he went forward with it when Dunbar decided that he wanted it. Although he did not know if he gave Laura Smith's statement to the solicitor, he did put the solicitor on notice that they may have an alibi defense. App. 617, ll. 2 - App. 623, ll. 15.

Beth Ann Young, the prosecuting solicitor for Dunbar, testified at the PCR hearing that she knew prior to trial that Dunbar intended to put up an alibi defense. She received notice from the trial

attorney and she heard Dunbar's jail phone calls to Laura Smith concerning her testifying as an alibi witness for him. App. 640, ll. 2 – App. 643, ll. 16.

The PCR judge ruled that Dunbar failed to establish that he suffered any prejudice from the judge not giving an alibi instruction. The PCR court found that the charge the trial judge gave to the jury was sufficient to inform the jury that the state had to prove beyond a reasonable doubt that Dunbar was at the scene of the crime and committed the crime. The PCR court cited the jury charge the trial court gave as: "The state had the burden of proof to prove each and every element of each offense beyond a reasonable doubt, and that a defendant was presumed innocent of every offense." The PCR court also cited the charge given that "the jury should use their common sense when considering all the evidence presented during the trial." This would include Dunbar's testimony and that of his two witnesses. The PCR judge held that Dunbar had not proven prejudice from trial counsel's error to not request an alibi charge. App. 684- App. 687.

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Supreme Court ruled in State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), that the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given, and the trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.

In Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991), the Supreme Court ruled that failure to request a proper jury instruction constituted ineffective assistance of counsel.

The PCR court relied on the case of Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013), where the Supreme Court found that although trial counsel was deficient for failing to request a jury charge on alibi, Gibbs failed to show he suffered prejudice from this deficiency. The Supreme Court in Gibbs held that the jury charge must be viewed in its entirety, and that the clarity of the jury charge requiring the state to prove the identity of the robber beyond a reasonable doubt was sufficient. App. 685 – App. 686.

Justice Toal wrote a dissent in Gibbs v. State, id., in which she found that defense counsel was ineffective for failing to request a jury charge on alibi as there was evidence of alibi presented. However, she found that Gibbs was prejudiced by counsel's deficiency because the state did not present overwhelming evidence of guilt since there was conflicting evidence of the color of the jacket found in Gibbs' home and one witness said Gibbs was not the robber.

Gibbs v. State, id. is distinguished from Dunbar's case. Identity was not the issue in Dunbar's case because the victim, Hynes, did not see the faces of the burglars but thought he recognized the voice of the co-defendant, Chris Herndon. The two alibi witnesses in Gibbs case

were his mother and girlfriend who said he was at home watching the TV show, *JAG,* with them between nine and ten o'clock at the time of the robbery. The state presented two rebuttal witnesses in Gibbs who testified that the only two stations available to Gibbs did not air *JAG* on the night of the robbery. But the state in Dunbar did not present evidence to prove the two alibi witnesses were not truthful as in Gibbs.

The PCR court also relied on Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), to show that there was a lack of prejudice when there was not a reasonable probability that the outcome would have been different had an alibi charge been given. However, Ford is distinguished because Ford's DNA was a match to the DNA of the semen found on the victim's clothing in that criminal sexual conduct case. There is no definite forensic evidence linking Dunbar to this incident.

The state presented evidence in Dunbar's case that DNA was found in the victim's car. The SLED witness testified that Dunbar could not be excluded as a "possible minor contributor" to this DNA which was a mixture of two individuals one if which was Hynes. App. 341, ll. 1 – App. 343, ll. 16. However, this was not proof that Dunbar's DNA was in the victim's car.

The PCR court distinguished Dunbar's case from that of Roseboro V. State, 317 S.C. 292, 454 S.E.2d 312 (19950, where the Supreme Court reversed the PCR court by holding that trial counsel was ineffective for failing to request an alibi charge. The Roseboro court said the evidence was entirely circumstantial and the solicitor disparaged Roseboro's alibi during his closing argument which left the impression that the petitioner bore some burden of proof on the issue.

In Dunbar's case, the direct evidence against Dunbar came from his co-defendant Herndon who had everything to gain by testifying against Dunbar. His charges were pending at the time of Dunbar's trial. App. 178, ll. 1 – 22. And from Jerry Thornton who was Herndon's cousin and whose credibility was an issue as he sold the cement mixer that he did not own, and had convictions

for fraudulent check charges. App.179, ll. 1-7; App. 101, ll. 1 – App. 103, ll. 4; App. 109, ll. 18 – App. 110, ll. 12.

The solicitor disparaged the testimony of Dunbar's two alibi witnesses by attacking their credibility. But the state did not present evidence to prove the two alibi witnesses were not truthful as in Gibbs.

The PCR court erred in failing to find trial counsel ineffective when by counsel's own admission he made mistakes. Counsel did not present a valid reason for not requesting a jury charge on alibi. Dunbar suffered prejudice because the jury needed to hear from the utmost authority in the court, the judge, that they could consider the alibi defense. The judge made it clear that he was giving the law to the jury for their consideration—that the jury was sworn to accept the law as he gave it to them. App. 33, ll. 13 – App. 34, ll. 17.

In State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), the Supreme Court wrote:

> No principle of law is more firmly established than the solemn duty of the court to determine the law of the case and declare it to the jury. That jury is bound by, and must accept and be governed by, the instructions of the court. 75 Am.Jur.2d Trial Section 574. Even assuming, arguendo, that the statements of law by counsel during the course of a trial were legally correct, the adversarial nature of our trial system mandates that the jury have a complete statement of the law from the trial judge. Arguments of counsel simply cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478 (1978).

The PCR court erred by failing to find Dunbar's trial ineffective for not requesting a jury charge on alibi which was prejudicial to Dunbar.

ARGUMENT

2

Trial counsel was ineffective for eliciting testimony on cross examination from a state's witness about Petitioner's drug use which opened the door to state's evidence against him on this issue after trial counsel had successfully objected to any mention of such; this was prejudicial to Petitioner as the state focused on Petitioner's need for drugs as a motive for the crime.

On October 7, 2008, in the early morning hours Daniel Hynes was awakened when two men kicked in his front door and held a knife to his throat with his face pointed down so that he did not see their faces. However, Hynes recognized the voice of Chris Herndon whom he knew. The men robbed his home, and tied him with cords. The men then took his car and left. The car was found abandoned later that night. The bloodhound Tracking Team was called and Chris Herndon came out of the woods and surrendered. He confessed and implicated Rusty Dunbar as the other man. App. 38, ll. 11 – App. 43, ll. 25.

At Dunbar's trial, Jerry Thornton testified that Dunbar and Herndon were working for him during that time. On October 6, 2008, the three of them were together, and decided they not want to work that day. They sold Thornton's saw and a cement mixer to get money to buy beer. App. 95, ll. 1 - App. 103, ll. 17.

Thornton said they bought crack with the money also. At that time, defense counsel objected on relevance. A bench conference was held. Then the judge told the jury:

> All right. The fact that they bought crack cocaine that day is not relevant to this case. Just disregard that.

App. 103, ll. 15 – App. 104, ll. 15.

Thornton continued to testify that he dropped Dunbar and Herndon at Daniel Hynes' house late that night because they were going to get drugs. Defense counsel again objected, but the judge overruled the objection. App. 104, ll. 16 – App. 105, ll. 16.

Thornton was supposed to return and get them later. Dunbar's girlfriend was with Thornton. She got a call from Dunbar to pick him up. Dunbar was alone. App. 105, ll. 17 – App. 108, ll. 24.

On cross examination, defense counsel opened the door to the drug evidence:

> **Counsel:** Well, earlier you testified that y'all sold the cement mixer for drugs; right?
>
> **Witness:** Yes. I took them to get drugs.
>
> **Counsel:** But that wasn't your drugs?
>
> **The Court:** Mr. Mims....Hold on. You just objected to all of that and now you're right back into it. So the objection is out the window. Go ahead.

App. 110, ll. 15 – App. 113, ll. 25.

Chris Herndon testified that he, Dunbar and Thornton drank beer and liquor all during the day of October 6, 2008 starting about that morning. They picked up Dunbar and his girlfriend to help them sell the rented cement mixer. App. 177, ll. 25 – App. 181, ll. 22. They sold the mixer and bought some crack. He, and Dunbar and Thornton smoked the crack. App. 184, ll. 17 – App. 187, ll. 22. They went to Laura Smith's father's house and drank more beer. They left around twelve o'clock that night. They decided to rob Daniels Hynes' house. Thornton dropped them off to find drugs in Hynes' house. They robbed the house, tied Hynes with cords and took his car. When the police spotted them, they abandoned the car. Herndon surrendered and confessed and implicated Dunbar. App. 189, ll. 1- App. 205, ll. 17.

Petitioner Rusty Dunbar testified in his own defense. He explained the drinking all day, and how Thornton and Herndon wanted to buy the drugs. He told of his use of crack and marijuana.

When they left Laura Smith's father's house, Thornton and Herndon dropped Dunbar and Laura at Thomas Dunbar's house about eleven or eleven thirty as the news was still on. Dunbar and Laura decided to spend the night. However, Dunbar could not sleep so he went to his car which was parked in the yard, and smoked crack. Thornton appeared and wanted Dunbar to alibi for him about the evening. Dunbar denied being at Daniel Hynes' house anytime that night. App. 392, ll. 11 - App. 407, ll. 22.

In her closing argument to the jury, the solicitor argued that crack was the reason behind the whole day. She argued that crack was the purpose of the day, and was important in this case. She told the jury that they wanted more crack and were "going to do whatever it took to get it." App. 467, ll. 10 – App. 469, ll. 10.

At his PCR hearing, Dunbar noted his attorney was ineffective for opening the door to the drug evidence after his attorney had successfully had the judge exclude it. When his attorney questioned Thornton about the drugs, the judge ruled that his objection to the drugs was out and effectively, the door was opened. This was prejudicial to Dunbar because the state's theory was that they ran out of drugs, and the reason for burglarizing Hynes home was to get more drugs or money for drugs. App.551, ll. 15 – App. 559, ll. 2.

The only reason Dunbar talked about drugs during his testimony was to try to mitigate the effect of his attorney's mistake. Dunbar would never have mentioned drugs if his attorney had not opened the door to the drugs coming in. Dunbar wanted a new trial. App. 602, ll. 12 – 604, ll. 23; App. 606, ll. 18 – App. 607, ll. 14.

Trial attorney testified that he made a mistake when he asked Thornton about the drugs. He admitted that he opened the door to the crack cocaine coming in. He believed that his opening the door to that prejudicial evidence allowed the state to seize that opportunity to use the drugs as

motivation for the crime. This was his first jury trial as he was just out of law school. App. 612, ll. 23 – App. 615, ll. 25.

The PCR judge ruled that Dunbar failed to prove that trial counsel was deficient and failed to establish any prejudice from trial counsel's actions. The PCR order provided that after trial counsel objected to the drug testimony by Thornton and the judge ruled that the state could not question about drug use, the trial court then overruled counsel's subsequent objection to the reference by Thornton again to drugs. App. 105, ll. 6 – 16. The PCR judge held that this made it clear from that point forward that the trial court was going to allow the State to elicit testimony concerning Dunbar and his friends' drug use prior to this incident. The judge wrote that Dunbar testified extensively about his own drug use which negated any prejudice. App. 683 – App. 684.

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

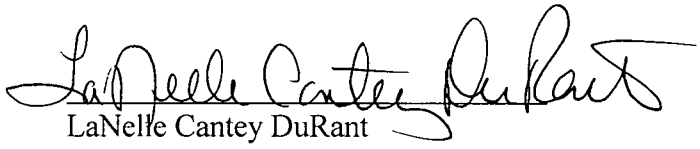
Trial counsel by his own admission was ineffective by questioning Thornton about the use of drugs prior to this incident. The PCR court erred in not finding counsel ineffective because he basically gave the state their motivation for the crime. The trial judge had obviously believed that the mention of crack cocaine was prejudicial to Dunbar. The PCR court erred by misinterpreting and assuming what the trial judge meant when he overruled counsel's objection on App. 105. On App. 113, ll. 17 – 25, the judge for the first time told trial counsel that his objection to the drugs was "out the window" because trial counsel had just questioned Thornton about the drugs. The judge did not state that the objection was lost back on App. 105 when he overruled counsel's objection. Therefore, the PCR court erred in this ruling. Dunbar testified that he talked about his drug use only because trial counsel had opened the door. He hoped it would help the jury understand his actions.

Dunbar was prejudiced because this mistake by counsel allowed the state to exploit the drug use as motivation for the crime. Dunbar was prejudiced because the trial court was going to keep out the mention of drugs prior to counsel's mistake.

CONCLUSION

Based on the above, certiorari should be granted, and petitioner's sentences and convictions should be reversed, and his case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Rusty Dunbar #294996, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of January, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.