

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

2008-CP-02-1271
Appellate Case No. 2014-000839

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THADDEUS CURRY,

Petitioner,

S.C. Supreme Court

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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

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ISSUE PRESENTED

Whether probative evidence supports the PCR court's finding that Counsel was not ineffective for strategically deciding not to present an alibi where one of the three alibi witnesses claimed the alibi was false and that she was coerced into corroborating the alibi by Petitioner and his sister and where the PCR testimony failed to provide a complete alibi.

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. Applicant was indicted at the May 2004 term of the Aiken County Grand Jury for murder (2004-GS-02-0839) and possession of firearm or knife during commission of or attempt to commit a violent crime (2004-GS-02-0838). Applicant was represented by Michael Chesser, Esquire. On May 10-13, 2004, Applicant proceeded to a jury trial before the Honorable Reginald I. Lloyd. Applicant was found guilty and sentenced to life imprisonment for murder and a consecutive term of five years incarceration for possession of firearm or knife during commission of or attempt to commit a violent crime.

A Notice of Appeal was filed on Applicant's behalf, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Curry*, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). The South Carolina Supreme Court denied Applicant's petition for writ of certiorari, and the remittitur was sent on April 4, 2008.

Applicant filed his first application for post-conviction relief on July 24, 2008 (C.A. No. 2008-CP-02-127), alleging ineffective assistance of counsel and after-discovered evidence. The State made its Return on or about February 17, 2009. An evidentiary hearing was convened into the matter on January 29, 2010, and reconvened on July 14, 2010, at which Applicant was present and represented by William J. Sussman, Esquire. The application was denied and dismissed with prejudice by the Honorable W. Jeffrey Young by order dated October 1, 2010, and entered October 8, 2010.

A timely Notice of Appeal was filed by the Applicant. By Order dated December 22, 2010, the South Carolina Supreme Court dismissed Applicant's appeal for failure to request the transcript within the prescribed time. The remittitur was sent on January 7, 2011.

On December 5, 2011, petitioner filed a second PCR application requesting an appeal of his first PCR case pursuant to Austin v. State, 305 S.C. 453, 409 S.E2d 395 (1995). The Respondent filed a Return and Motion to Dismiss on July 30, 2012, requesting the action be dismissed in part as untimely filed and successive in nature, but requesting a hearing be set solely on the issue of whether Petitioner was entitled to an Appeal pursuant to Austin v. State. On April 8, 2014, Judge Dickson entered a consent order granting the PCR appeal pursuant to Austin v. State. Judge Dickson denied and dismissed all additional allegations. The Petitioner subsequently filed a Petition for Writ of Certiorari pursuant to Austin v. State on December 29, 2014. This Return follows.

SUMMARY OF THE FACTS

Heath Hamilton ("Victim") and Ronald Coursey ("Coursey") encountered Applicant, Anthony Savage ("Savage"), and Jeremy Simuel ("Simuel") on March 17, 2003, at an apartment complex as Victim and Coursey sought to purchase marijuana. Javon Rushon ("Rushon") also saw Victim at the apartment complex looking to purchase marijuana, and some of the individuals had been sitting on Rushon's car outside the apartments. It was arranged that Victim and Coursey would await a phone call from Savage and Applicant. Victim and Coursey went to Victim's home to wait for the phone call. Though Savage, Simuel, and Applicant did not procure any marijuana, they arranged a meeting with Victim and Coursey at a gas station in Beech Island in the early morning hours of March 18, 2003.

Victim and Coursey arrived in Victim's truck. Applicant and Savage exited a vehicle driven by Simuel and approached the truck. Simuel testified that Applicant had a black bag with him when he entered the car and took the bag when he and Savage exited. Coursey testified that they demanded money and Victim began to try to leave. Thereafter, Victim was shot. Coursey stated that Applicant fired the shots and that Savage did not have a gun. Applicant and Savage fled in the car driven by Simuel. Coursey moved Victim in order to drive the vehicle away and immediately called 9-1-1.

Savage's phone number was written on Victim's hand. All casings from the scene were from the same gun. Coursey identified Applicant as the shooter. Savage also identified Applicant as the shooter. Savage testified that as they fled in the car afterward, Applicant said he "dome capped him," meaning he shot Victim in the head. Simuel also testified that Applicant was boisterous about the shooting in the car. Simuel testified that when he spoke to Applicant the following day, Applicant said he had gotten rid of the gun. Rushon testified that the day after the

shooting, Simuel had told him that his car was seen in association with the crime. According to Rushon, Savage and Simuel showed him a statement and told him to “stick to it.” Rushon conceded that his initial statement to police was what he had been told to say. After meeting with police, Rushon, Savage, and Simuel picked Applicant up from an unspecified location alongside the road. Rushon testified that the four then went to a car wash. Rushon stated that he overheard Applicant tell Savage to get rid of a jacket, that the hammer on the gun had broken, and that Applicant had disposed of the gun. Simuel also testified that Savage and Applicant discussed disposal of the jacket and gun.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Argument

Probative evidence supports the PCR court's finding that Counsel was not ineffective for strategically deciding not to present an alibi where one of the three alibi witnesses claimed the alibi was false and that she was coerced into corroborating the alibi by Petitioner and his sister and where the PCR testimony failed to provide a complete alibi.

Petitioner argues Counsel was ineffective for failing to present Petitioner's alibi witnesses and defense. However, this argument is meritless as probative evidence supports the PCR court's finding that Counsel was not ineffective.

In the instant case, Petitioner argues Counsel was ineffective for failing to present testimony of three alleged alibi witnesses: Petitioner's sister, Valerie Curry ("Valerie"), Petitioner's mother, Evonne Fraraccio ("Fraraccio"), and Petitioner's then fiancé, Charlette Broadwater ("Broadwater"). However, Petitioner completely ignores the fact that the key alibi witness, Marggie Darden ("Darden") stated the alibi was false and was completely fabricated by Petitioner and Valerie. As stated below, Counsel can clearly not be held ineffective where he investigated the alibi witness, found the alibi to be fabricated and not credible, and instead, chose to pursue another defense at trial.

During the PCR hearing, Petitioner testified that he was charged with the murder of Heath Hamilton ("Victim"). Victim was shot on the evening of March 17, 2003. Petitioner claimed he was at his mother's house on March 17, 2013, until eight or nine o'clock. While at his mother's house, Darden came over and requested that he purchase some liquor for her St. Patrick's Day party. (App. p. 574 lines 7-10). Petitioner stated he purchased Darden some alcohol, and then they went to Food Lion where his sister, Valerie was working. (App. p. 574 lines 11-15). Petitioner stated they visited with Valerie and bought a Coca-Cola and Newport 100's. (App. p. 574 line 23—p.575 line 17). Petitioner stated he and Darden left Food Lion and

went to her apartment and played cards. (App. p. 575 lines 19-23). Petitioner stated Valerie came over after she got off work and they stayed at Darden's apartment until about two o'clock in the morning. (App. p. 576 lines 6-18). Petitioner stated that he told Counsel about his alibi, and Counsel hired a private investigator, David Cunamin, to interview the various witnesses. (App. p. 577 lines 1-5). Petitioner stated he knew Cunamin had interviewed both Valerie and Darden prior to his trial. (App. p. 578 lines 2-9).

Following Petitioner's testimony, Fraraccio testified on behalf of Petitioner. Fraraccio stated that Petitioner was at home with her watching movies. (App. p. 650 lines 18-23). Fraraccio stated that Darden came over to the house around six o'clock and asked Petitioner to get dressed and she would return to pick him up. (App. p. 651 line 9—p. 652 line 14). Fraraccio stated Antonio Savage also came over and spoke with Petitioner for approximately ten minutes. (App. p. 652 line 15—p. 653 line 11). Fraraccio stated Darden returned around eight o'clock and picked up Petitioner and they left. (App. p. 653 lines 14-25). Fraraccio stated Petitioner and Darden returned to her house around nine-thirty or ten and dropped off some crab legs, whole steamed green beans, and steamed rice. (App. p. 654 lines 8-17). Fraraccio stated she did not see Petitioner again until the next morning.

Following Fraraccio's testimony, Valerie testified on Petitioner's behalf. Valerie stated that she got off work around eleven to eleven thirty the night of March 13, 2003 and went over to Darden's apartment. (App. p. 657 lines 3-9). Valerie stated there were four to five guys at Darden's house. (App. p. 657 lines 13-19). Valerie stated they left Darden's home around three o'clock in the morning. (App. p. 658 lines 17-19). Valerie further recalled being interviewed by Cunamin. (App. p. 659 lines 18-23). Valerie recalled telling Cunamin that she had fallen asleep at one thirty in the morning. (App. p. 659 line 23—p. 660 line 1).

Following Valerie's testimony, Broadwater was called to testify on behalf of Petitioner. Broadwater stated that she was with Petitioner ninety to ninety five percent of the time. (App. p 662 lines 18-22). Broadwater stated Petitioner would call her two or three times a day when they were not together. (App. p. 661-662).

Following Broadwater's testimony, Counsel was called to testify. Counsel stated Petitioner claimed he had an alibi from day one. (App. p. 669 lines 10-13). Counsel stated Petitioner's and Valerie testimony at the PCR hearing was consistent with what they stated prior to trial. (App. p. 669 lines 13-19). Counsel stated he hired an experienced investigator out of Augusta to conduct interviews of various witnesses, including Valerie and Darden. (App. p. 669). Counsel stated Darden denied Petitioner was at her apartment. (App. p. 671 lines 15-18). Counsel explained Darden's statement put him in a position to where he could not use her as a witness at trial because she was going to say the family put her up to fabricating the alibi. (App. p. 671 lines 20-23).¹ Counsel stated Darden's testimony would have been crucial to corroborating the alibi. (App. p. 672 lines 1-2). Counsel concluded if they did not have Darden's testimony then they would not have an alibi. (App. p. 672 lines 2-4).

Counsel's determination that the alibi would fail absent Darden's corroboration, and would certainly fail if an alibi witness contradicted the alibi was deemed valid. The PCR court further found that Petitioner failed to demonstrate prejudice as the alibi presented by Valerie, Faraccio, and Broadwater lacked credibility. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (This court gives great deference to a PCR judge's findings where matters of credibility are involved). Additionally, the PCR court found that the testimony of the three witnesses failed to

¹ Darden's statement was introduced as State's exhibit # 1. Within the statement Darden states Petitioner and his sister came up with the alibi and Petitioner was not at her apartment at all the night of March 13, 2003. Notably, Darden stated she did not even know Petitioner and only met him one time. Darden further explained that Petitioner's sister, Valerie was the one who approached her about corroborating the alibi.

establish a complete alibi. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012) (a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime).

In support of his argument, Petitioner relies on Walker to argue Counsel was ineffective for failing to present his alibi defense. However, unlike defense counsel in Walker, Counsel stated he hired a private investigator, Cunamin, to investigate into all leads and witnesses. Cunamin interviewed the two key alibi witnesses, Valerie and Darden. Counsel stated Petitioner's and Valerie's testimonies at the PCR hearing were consistent with their statements prior to Petitioner's trial. However, Counsel testified that Darden was approached by Valerie and asked to corroborate the alibi. Counsel further explained that Darden stated the alibi was false and she really did not know Petitioner. Faced with this conundrum, Counsel made the reasonable strategic decision to abandon the alibi defense and pursue other, more plausible defenses at trial. See Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (a witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions).

Respondent further submits, Counsel's decision not to present an alibi is certainly a reasonable strategic decision because the alibi was merely corroborated by two family members, Valerie and Faraccio, and clearly contradicted by an un-bias witness, Darden. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Additionally, Counsel opined that alibis corroborated only by close family members are not effective. (App. p. 7-2 lines 9-18). The PCR Court's finding that Counsel was not deficient in failing to present Petitioner's alibi defense at trial is clearly supported by ample probative evidence.

Additionally, Petitioner can show no prejudice as a result of Counsel's alleged deficiency because the testimony of Faraccio, Valerie, and Broadwater did not account for Petitioner's whereabouts during the time the crime was committed. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (finding no prejudice where witness testimony did not establish an alibi because the petitioner could have traveled to the crime scene). Faraccio testified that she last saw Petitioner around nine thirty or ten when he and Darden dropped various food items off at her house. Valerie testified that she was at Darden's apartment with Petitioner and four or five other people from eleven o'clock until three o'clock. However, even assuming this is true, Valerie testified that she fell asleep around one or one thirty in the morning. Broadwater merely testified that she would typically receive a phone call from Petitioner around midnight, but could not personally account for his whereabouts the night of the murder. Completely ignoring the fact that Darden stated the alibi was false, the testimony of Faraccio, Valerie, and Broadwater still do not amount to a complete alibi as none of the witness can account for Petitioner's whereabouts the entire night of March 13, 2003, leading up to the early morning hours of March 14, 2003. Therefore, Petitioner can show no prejudice as none of the witnesses' testimonies provide a complete alibi.

Accordingly, the PCR court did not err in finding Counsel was not ineffective for failing to present Petitioner's alibi defense at trial.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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March 12, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
The Honorable Edgar W. Dickson, Circuit Court Judge

THADDEUS CURRY,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 12th day of March, 2015


CAROLINE COLLINS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

March 12, 2015

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

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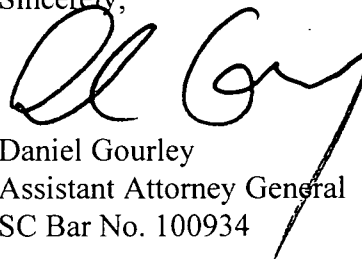
S.C. Supreme Court

Re: Thaddeus Curry v. State of South Carolina
Appellate Case No. 2014-000839
Lower Court Case No. 2008-CP-02-01271

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari Pursuant to Austin v. State in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Appellate Defender Susan B. Hackett (2 copies)