



ALAN WILSON
ATTORNEY GENERAL

March 25, 2015

VIA HAND DELIVERY

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

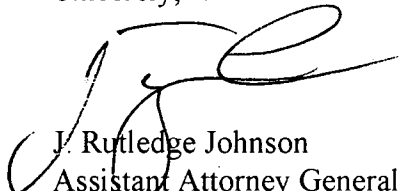
RECEIVED
MAR 25 2015
S.C. Supreme Court

RE: Phillip Watts, Jr. v. State of South Carolina
Appellate Case No: 2013-002720

Dear Mr. Shearouse:

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

Sincerely,


J. Rutledge Johnson
Assistant Attorney General
Bar No: 78871

JRJ/nb
Enclosures

cc: John H. Strom, Esquire (2 copies)

STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 25 2015

S.C. Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No.: 2013-002720

Phillip Fleming Watts..... Petitioner,

v.

State of South Carolina Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Is the issue of whether Counsel “adopted an objectively unreasonable trial strategy relying on the alibi witness testimony of Petitioner’s sister” preserved for appeal? Nevertheless, is the issue without merit as there is overwhelming evidence of Petitioner’s guilt in this case?

- II. Is there any evidence of probative value to uphold the PCR court’s order where Petitioner failed to prove resulting prejudice from Counsel’s failure to seek a mental evaluation because Petitioner produced no evidence or testimony at the PCR hearing to prove that he was either legally insane at the time of the offense or not competent to stand trial?

STATEMENT OF THE CASE

Phillip Fleming Watts, ("Petitioner"), was indicted by the May 2008 term of the York County Grand Jury for Armed Robbery (2008-GS-46-2083) and Possession of a Firearm during the Commission of a Violent Crime (2008-GS-46-2083A). John Freeman, Esquire, represented him. On September 22-24, 2008, Petitioner proceeded to a jury trial pursuant to which he was found guilty of both charges as indicted. The Honorable John C. Few sentenced Petitioner to confinement for thirty (30) years for Armed Robbery and five (5) years, consecutive, for the weapons charge.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Watts, Op. No. 2011-UP-421 (S.C. Ct. App. filed September 20, 2011). The Remittitur was issued on October 13, 2011.

Petitioner subsequently filed an application for post-conviction relief (PCR) on March 19, 2012. Respondent made its Return on July 5, 2012. On August 13, 2013, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by James "Bill" Hancock, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On September 12, 2013, the Honorable G. Edward Welmaker denied and dismissed the Petitioner's application with prejudice by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari on January 7, 2015. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, 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).

ARGUMENTS

- I. The issue of whether Counsel “adopted an objectively unreasonable trial strategy relying on the alibi witness testimony of Petitioner’s sister” is not preserved for appeal. Nevertheless, the issue is without merit as there is overwhelming evidence of Petitioner’s guilt in this case.**

Petitioner asserts Counsel was ineffective for calling Petitioner’s sister as an alibi witness because she was impeached at trial with a State’s rebuttal witness. This issue was alleged in his application nor ruled upon by the PCR court and thus, not properly preserved for appeal. Nevertheless, the issue is meritless.

“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal.” State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974).

While Petitioner testified concerning this issue during the evidentiary hearing, this issue was neither raised in his application nor ruled upon by the PCR court. Further, no 59(e) was filed on Petitioner’s behalf to preserve the issue. Therefore, this issue is not properly before this Court.

Nonetheless, this issue is without merit as there is overwhelming evidence of Petitioner’s guilt in this case.

Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991).

During the trial, the cashier from the One Stop Convenience Store that Petitioner robbed testified Petitioner was wearing a blue “hoodie” (sweatshirt) which had “Gold Hill” written on the front. (App. p. 197 lines 7-9). Three other eye-witnesses also testified that they saw Petitioner leaving the One Stop in a blue “hoodie” with “Gold Hill” written on the front it. (App. p. 260 line 11; p. 284 lines 12-24; App. p. 313 lines 13-20). These three witnesses also testified they each saw a dark colored (purple/red) Dodge Durango with tinted windows pull out from behind the store from where Petitioner ran and turn onto Highway 5 in Rock Hill, SC. (App. p. 266 line 1-p. 267 line 2; p. 286 line 12- p. 287 line 19; p. 311 lines 18-21). Petitioner’s girlfriend testified that she owned a Burgundy Dodge Durango with tinted windows and let Petitioner borrow her car on the night of the robbery. (App. p. 403 line 13- p. 406 line 2). His girlfriend also identified Petitioner on the video tape from the One Stop. (App. p. 417 line 19- p. 418 line 13). Most importantly, when Petitioner was arrested, he gave a confession to his involvement in this crime. “I robbed the store across from Northwestern High School. I drove [girlfriend’s] burgundy Dodge Durango and parked it on the street behind the store and walked up there. I was wearing blue hooded sweatshirt that had Gold Hill across the front in white lettering. People saw me leave in the Durango...the gun that was found in an apartment when I was arrested is the one that I used.” (App. p. 445 line 22- p. 446 line 4).

Counsel called Petitioner’s sister on Petitioner’s behalf who testified Petitioner was at home when she went to sleep on the night of the robbery and was on the couch when she woke up. (App. p. 520 line 9- p. 521 line 18). Petitioner’s sister also testified when she woke up and dressed for school, she saw Petitioner on the couch. (App. p. 521 line 12-20). After the defense rested its case, the solicitor called Jennifer Anderson, the attendance coordinator of the Rock Hill County School District, to testified that the date, which Petitioner’s sister testified she saw

Petitioner before she left for school, was Martin Luther King, Jr. Day, a national holiday. There was no school that day.

While Counsel was arguably deficient for calling Petitioner's sister to testify about her attending school on a national holiday, Petitioner has failed to show that "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. 115, 117-18, 386 S.E.2d 624, 625 (1989). Clearly, there is overwhelming evidence of Petitioner's guilt in this case. Four witnesses testified they saw Petitioner wearing a blue "hoodie" with "Gold Hill" inscribed on the front of it. Three of these witnesses testified they saw a purple/burgundy Dodge Durango, a very distinct-bodied car, with tinted windows drive off from around the back of the store after the robbery. Additionally, Petitioner's own girlfriend testified she allowed Petitioner to drive her **burgundy Dodge Durango with tinted windows** on the night of the robbery. But better yet, Petitioner confessed to exactly to what all of the other witnesses testified: that he robbed the One Stop in a blue "hoodie" with "Gold Hill" written on it and then fled in his girlfriend's burgundy Dodge Durango. Petitioner unmistakably committed this crime, and even if Counsel had not called Petitioner's sister to testify at trial, the outcome of the case would be the exact same as it is now. Therefore, no prejudice can be shown from Counsel's alleged error. Thus, Petitioner has failed to meet his burden of proof as to this argument.

II. There is substantial evidence of probative value to affirm the PCR court's order that Petitioner failed to prove resulting prejudice from Counsel's failure to seek a mental evaluation as Petitioner produced no evidence or testimony at the PCR hearing to prove that he was either legally insane at the time of the offense or not competent to stand trial.

Petitioner asserts "Petitioner's Sixth Amendment rights were violated when counsel failed to seek a mental evaluation of Petitioner prior to trial to determine if he was legally insane at the time of the offense or was competent to stand trial." This argument is without merit.

First and foremost, any discussion of Petitioner's subsequent criminal proceedings, including his two guilty pleas, the transcripts of which were never entered as exhibits at the PCR hearing, are completely irrelevant as to this appeal and should be stricken from the record, specifically page 11 of Petition for Writ of Certiorari and the Supplemental Appendix.

Concerning Petitioner's mental health, Petitioner testified at the PCR hearing that he and Counsel discussed his mental health issues, told Counsel he was on medications for schizophrenia and bi-polar disorder, and that Counsel never gave him an option for a hearing as to his mental health status. (App. p. 691 line 2-25). However, Petitioner provided no credible evidence that he was legally insane at the time he robbed the One Stop or that he was incompetent to stand trial. Specifically, Petitioner failed to present expert testimony or any psychological reports at the PCR hearing.

Counsel first testified that he did not recall any discussions with Petitioner concerning Petitioner's mental health and did not have any concern about Petitioner's mental health or Petitioner's ability to assist in his own defense. (App. p. 706 lines 18-24). Counsel also stated if he had a concern about Petitioner's mental health or ability to assist in his own defense, Counsel would have requested Petitioner be evaluated. (App. p. 707 lines 5-8). Additionally, Counsel testified he has represented clients whom he questioned their competence either to stand trial or

assist in their own defense throughout his tenure as an attorney. (App. p. 707 line 23-p. 708 line 1). Counsel also testified he has had clients mentally evaluated in certain cases, contrary to Petitioner's assertions on pages 12 and 13 of the Petition for Writ of Certiorari. (App. p. 708 lines 6-11). Counsel then stated Petitioner did not exhibit the symptoms of mental incompetence. (App. p. 708 lines 12-15). Contrary to Petitioner's testimony, Counsel testified Petitioner never brought his mental health issues to Counsel's attention. (App. p. 708 lines 16-18).

In a PCR action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the 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).

"The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). Petitioner must show that he was "unable to distinguish moral or legal right from wrong and to recognize the particular act charged as morally or legally wrong." Id. at 233. A Petitioner claiming that trial counsel was ineffective in failing to pursue this defense "must produce some evidence of insanity or showing that with the exercise of due diligence, an insanity defense could have been developed." Jeter at 233-34. No prejudice can be shown for Counsel's alleged failure to request a mental evaluation where no medical evidence is presented at the PCR hearing suggesting that Applicant was incompetent to stand trial or to participate in his own defense. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

In this case, as in Jeter, Petitioner failed to produce live medical testimony or supporting affidavits showing he was either insane at the time of the robbery or that he was incompetent to stand trial. To the contrary, Counsel testified he had no concerns about Petitioner's mental health and that Petitioner was able to assist in his own defense. Importantly, the PCR court found Counsel's testimony concerning the alleged ineffectiveness credible and found Petitioner's testimony not credible. (App. p. 720). See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court's findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses). As Petitioner has failed to prove that he was insane at the time of the robbery or that he was incompetent to stand trial, he can prove no resulting prejudice from any alleged deficiency by Counsel. Therefore, the PCR correctly held that Counsel was effective and Petitioner failed to prove resulting prejudice. (App. p. 723). Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

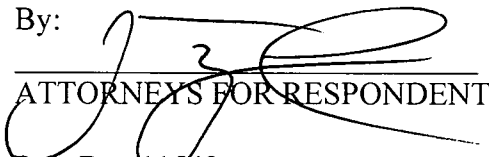
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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J. RUTLEDGE JOHNSON
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S.C. Bar # 78871

By:



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March 25, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable G. Edward Welmaker, Circuit Court Judge

PHILLIP WATTS, JR.,

Petitioner,

v.

STAT 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 party by mailing(2) copies in the United States mail, postage prepaid:

**John H. Strom, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211**

This 25th day of March, 2015


NORMA BIGBEE
LEGAL ASSISTANT