(5)

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No.: 2011-204386

Darrell Goss..... Petitioner,

v.

State of South Carolina..... Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No.: 2011-204386

Darrell Goss..... Petitioner,

v.

State of South Carolina..... Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

Whether the PCR court properly found that the Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to investigate and failing to present an alibi defense at trial.

STATEMENT OF THE CASE

The Respondent adopts the procedural history presented by the Petitioner.

ARGUMENT

I. There is probative evidence to support the PCR court's finding that trial counsel was not ineffective for failing to investigate and failing to present an alibi defense.

Petitioner asserts that the post-conviction relief court erred by finding that trial counsel was not ineffective for failing to investigate potential witnesses and to present an alibi defense at trial. Respondent submits probative evidence exists to support the post-conviction relief court's findings that Petitioner failed to carry his burden of proving he received ineffective assistance of counsel. The Brief of Respondent should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant 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 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, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant 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 Applicant 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. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

At the evidentiary hearing, the Petitioner testified that he met with trial counsel one time prior to his trial (App. 632). He testified that he never talked to trial counsel about his case prior to trial. (App. 632). The Petitioner testified that he gave trial counsel the names of several potential witnesses at the beginning of his trial. (App. 632). He testified further that had trial counsel interviewed him prior to trial, he would have given him the names of Sharon Goss, Benny Goss, Clifford Hartwell, and Angelique Gadsden (App. 633). He testified that Benny Goss, Clifford Hartwell, and Angelique Gadsden would have testified that they witnessed guys selling clothes on the street to his mother Thomasina Goss. (App. 633). He testified that Sharon Goss would have testified that he purchased the gun found in the car outside of the Petitioner's home that contained the victim's DNA from the guys selling clothes on the street. (App. 640).

Petitioner testified further that he never discussed his alibi witness with trial counsel. (App. 651-2). Lastly, the Petitioner testified that he would have told trial counsel that he was at his son's baby shower on the day of the crime. (App. 634). Present at the evidentiary hearing were several witnesses who were available to testify that the Petitioner was at his son's baby shower on the day of the crime. The Court took judicial notice of their presence and that they would all testify to the Petitioner being present at the baby shower on the day of the crime. (App.

643) The Court also took judicial notice of the witnesses' testimony that they had witnessed Thomasina Goss purchasing clothes from men on the street. (App. 645).

At the evidentiary hearing, trial counsel testified that he discussed the elements of the charges against the Petitioner, discussed potential defenses, and reviewed discovery with the Petitioner prior to his trial. (App. 664-5). He testified that he was prepared for trial and his investigation of the case involved reviewing the discovery he received from the State and figuring out the best defense. (App. 665). Counsel testified that he was unable to hire an investigator because the Petitioner could not afford it. (App. 672). He testified that he met with the Petitioner a couple of times when he first got arrested. (App. 656). He testified further that he told the Petitioner that it would be awhile before his case went to trial because he had 19 pending indictments. (App. 656). After the Petitioner complained to Chief Justice Toal about the length of time that had passed since his arrest, trial counsel met with the Petitioner again. (App. 655).

Trial counsel testified that he first learned of an alibi defense after the Petitioner's trial was over. (App. 656). He testified that he did not have a discussion with the Petitioner about the alibi and did not know about it prior to trial. (App. 660). Counsel testified that he felt the Petitioner had a solid defense and that he was able to defeat each piece of circumstantial evidence that the State had. (App. 661). He testified that even if he had known of the alibi, he is not sure if strategically he would have put up the alibi defense because he felt he was able to defeat the circumstantial evidence. (App. 661, 667). Counsel testified that he tends not to put up an alibi defense unless he has to because there is always skepticism when family members are testifying. (App. 667).

He testified that he was aware of some of the witnesses that would testify about the men selling stuff on the street. (App. 656). Counsel testified that he chose to use the Petitioner's

mother to testify about her purchase of things from the men on the street because he felt she was very persuasive and convincing. (App. 657). He testified that the Petitioner's mother told the event very well and was a strong witness. (App. 657, 661). Trial counsel testified further that he never knew of Sharon Goss' testimony regarding his purchasing of the pistol. Counsel testified that had he known of Goss' testimony he would have elicited that information from the Petitioner's mother when she took the stand at trial. (App. 656) Lastly, counsel testified that the Applicant and his mother never mentioned the purchase of the gun by Sharon Goss or the Petitioner's alibi.

The post-conviction relief court denied the Petitioner's application for post-conviction relief. The Court found that trial counsel's testimony was credible and the Petitioner's testimony was not credible. (App. 696). The Court found further that trial counsel articulated a valid trial strategy of calling the Petitioner's mother to testify instead of the Petitioner's other potential witnesses. (App. 696). The Court also found that trial counsel was never informed of a possible alibi defense by the Petitioner prior to trial. (App. 697).

The Petitioner asserts that the PCR court erred in finding that trial counsel was not ineffective for failing to investigate potential witnesses presented by the Petitioner at his PCR hearing. The Respondent submits that trial counsel effectively investigated the Petitioner's case and made a strategic decision to call the Petitioner's mother to testify.

To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Where matters of credibility are involved, this Court gives great deference to a judge's findings, since it lacks the opportunity to directly observe the witnesses. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d

517 (1993); Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994). The Respondent submits that trial counsel gave credible testimony that he investigated the Petitioner's case and believed he could defeat each piece of circumstantial evidence presented by the State. Counsel also gave credible testimony that he reviewed the discovery and was able to put together a defense he felt was very strong. Counsel's investigation of the facts surrounding the Petitioner's case was further evidenced by his ability to give a summary of the State's evidence against the Petitioner at the evidentiary hearing.

In addition, several of the witnesses that the Petitioner produced at the PCR hearing were known by trial counsel. Counsel testified that he knew of others who witnessed the Petitioner's mother purchasing clothing from men on the street after the robbery, but that it was a part of his trial strategy to call the Petitioner's mother to testify. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The Respondent submits that trial counsel articulated a valid trial strategy for calling Thomasina Goss to testify at trial. He testified that he chose to call Goss as a witness at trial because she was very convincing, spoke very well, and would be able to tell the story of the event very well. In Jackson v. State, this Court held that it is a valid trial strategy when trial counsel chooses to call one witness over another because they believe the witness will be more credible. Jackson, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998). Here, trial counsel

articulated the same rational for calling Goss to testify as opposed to calling the other witnesses provided by the Petitioner.

In addition, Goss' testimony was the same as the potential witnesses presented by the Petitioner at the PCR hearing and therefore would have been cumulative if presented at trial. This Court held in Cherry v. State, that trial counsel's failure to ensure presence of defense witness did not constitute deficient performance or prejudice defendant, so as to constitute ineffective assistance, where witness' testimony would have been cumulative. Cherry, 300 S.C. 115, 386 S.E.2d 624 (1989). Trial counsel was not ineffective for failing to investigate or call potential witnesses to give testimony that was identical to the testimony given at trial by the Petitioner's mother.

The Respondent submits that trial counsel was not ineffective for failing to call Sharon Goss to testify about his purchase of the gun found in a car outside of the Petitioner's home. Trial counsel gave credible testimony that he was not aware of Sharon Goss' testimony and had he known of such testimony prior to trial he still may not have called Goss to testify. He testified that he would likely have elicited such testimony from the Petitioner's mother when she took the stand. Trial counsel cannot be deemed ineffective for failing to call a witness whose testimony he was never informed of.

> The Petitioner also asserts that the PCR court erred in finding that trial counsel was not ineffective for failing to present an alibi defense. The Respondent submits that trial counsel could not have presented an alibi defense because he was never informed of an alibi by the Petitioner or his mother Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making

> the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.
>
> Strickland at 689, 104 S. Ct. at 2065
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland at 691, 104 S. Ct. at 2066.

Trial counsel could not have investigated an alibi defense because he was never informed of the alibi or substance of Goss' testimony prior to trial. Not only did trial counsel give credible testimony at the PCR hearing that he was not informed of an alibi prior to trial, but the Petitioner also testified during the PCR hearing that he never told trial counsel of his alibi. Prior to trial, the Petitioner testified that he told trial counsel of several potential witnesses that were present and could give testimony identical to that of his mother, Thomasina Goss. However, he never indicated to counsel prior to trial that he was present at his son's baby shower during the crime. The Petitioner had ample opportunity to communicate this significant fact to trial counsel prior to trial. Trial counsel could not have further investigated an alibi defense that he was never informed of. Trial counsel's performance at trial was based on the information that he knew at the time of time. The lower court properly evaluated trial counsel's performance based on his perspective at the time of the Petitioner's trial.

Further, the Petitioner was not prejudiced by trial counsel's inability to pursue an alibi defense prior to trial because trial counsel testified that even had he known of the existence of an

alibi, he may not have presented that defense to the jury. The Respondent submits that there is probative evidence to support the lower court's finding that the Petitioner failed to carry his burden of proving that trial counsel was not ineffective for failing to investigate and for failing to present an alibi defense.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

BY: _____
J. Rutledge Johnson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

May 21, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2011-204386

Darrell Goss,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copies in the United States mail, postage prepaid, addressed to the Petitioner's counsel:

David Alexander, Appellate Defense
SC Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211

This 21st day of May, 2015.

J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 21st day of May, 2015.

Ashley Hamrick

Notary Public for South Carolina.
My Commission Expires: 3-18-23