ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Georgetown County

Kristi Lea Harrington, Circuit Court Judge

DONOVAN RAHEAM PRINGLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000017

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did trial counsel's failure to call two witnesses to testify in support of Petitioner's alibi violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments where the prosecution presented no physical evidence linking Petitioner to the crime, the only evidence against Petitioner were inconsistent statements by a co-defendant, and trial counsel admittedly had no defense strategy?

II. Did trial counsel's failure to conduct a pre-trial investigation violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments where trial counsel had no defense strategy and a pre-trial investigation would have supported presentation of an alibi defense?

STATEMENT OF THE CASE

On July 8, 2009, a Georgetown County grand jury indicted Petitioner for armed robbery (2009-GS-22-00836) and possession of a weapon during the commission of a violent crime (2009-GS-22-00837). App. 360-361; App. 363-364. The state, represented by Nancy Cote, called the case for trial before the Honorable Benjamin H. Culbertson and a jury on December 14, 2009. Reuben Goude represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 182, lines 11-17. Judge Culbertson sentenced Petitioner to twenty years' imprisonment for armed robbery and five years' imprisonment for the firearm. He ordered the sentences to be served concurrently. App. 189, lines 16-24; App. 362; App. 365. Petitioner filed a timely notice of appeal, which was perfected by Elizabeth Franklin-Best. App. 192-201. On May 16, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Pringle, 2012-UP-303 (S.C. Ct. App. filed May 16, 2012); App. 212-213.

On July 10, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 214-240. On August 28, 2014, the matter proceeded to an evidentiary hearing before the Honorable Kristi L. Harrington. App. 255. Tristan Shaffer represented Petitioner. Joshua Thomas represented the state. App. 256. By an order filed on October 20, 2014, Judge Harrington denied Petitioner relief. App. 345-353. Petitioner filed a motion to alter or amend and motion to reconsider on October 31, 2014. App. 354-357. On November 4, 2014, Judge Harrington denied the motions. App. 358. Petitioner filed a timely notice of appeal.

This petition for writ of certiorari follows.

STATEMENT OF FACTS

Relevant facts from the trial

By letter dated December 9, 2009, trial counsel sent a "notice of alibi" to the solicitor. Supp. App. 1-2. The trial started five days later on December 14, 2009. App. 7, line 1. The solicitor moved to exclude any evidence of an alibi because the notice was not served timely as required by Rule 5(e)(1), SCRCrimP.[1] App. 7, line 20 – App. 8, line 13. Trial counsel indicated he would not oppose a continuance if the state wanted time to investigate the alibi. App. 8, lines 16-18; App. 9, line 5. However, trial counsel argued against excluding the evidence noting the alibi witnesses were "household relatives" who "were going to say that [Petitioner was] in the house with them at the time of the robbery." Trial counsel then noted the large number of individuals capable of investigating the alibi at the state's request. App. 8, line 19 – App. 9, line 5. Trial counsel explained his tardiness was because of on-going negotiations in the case and noted, "[I]t's hard to know exactly what to do up until the, up until the present." App. 9, lines 6-14.

The trial judge ruled to exclude any evidence of the alibi. He noted that the crime occurred on December 23, 2008 and Petitioner was arrested soon thereafter. However, trial counsel "waited until last Wednesday to provide the alibi defense." The judge concluded that Petitioner was aware of the defense and the witnesses since December 2008 because the

[1] The rule provides that "[u]pon written request of the prosecution stating the time, date, and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense." Further, the rule requires the notice to "state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi." Rule 5(e)(1), SCRCrimP.

witnesses were "household members." He further emphasized the clarity of the rule regarding the timing of notice. App. 9, line 22 – App. 10, line 5.

During the offer of proof, trial counsel provided a copy of the notice to be made a court's exhibit. Supp. App. 1-2; App. 12, lines 11-14. Further, trial counsel explained that his secretary had prepared the notice while he was in court and two of the alibi witnesses were not household members and should not have appeared on the notice. However, the first three witnesses listed were family members or friends and would say that Petitioner was in the house asleep at night during the robbery. App. 11, lines 20-25.

When the trial started, trial counsel's opening statement consisted of five brief sentences, none of which discussed the case: "My name is Reuben Goude. I'm a lawyer here in Georgetown. I represent [Petitioner] who is seated over there. What I ask you to do is listen to the evidence that's going to be presented on the witness stand today and tomorrow and I'll come back tomorrow and I'll discus the verdict with you at that time. Thank you very much." App. 70, lines 5-10.

Thereafter, Herman Lee Michau, the desk clerk at the Carolinian Inn, testified that on December 23, 2008 between 4 and 5 a.m.,[2] two black males with bandanas around their faces entered the hotel and demanded money.[3] App. 71, lines 9-12; App. 71, line 18 – App. 72, line 11; App. 72, lines 23-25; App. 73, lines 1-9. He described the men as carrying kitchen knives

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[2] The lead investigator on the case, Richard Floyd, testified that he received the call to respond "approximately around 4:30, 5 o'clock in the morning hours." App. 103, lines 10-17.

[3] Michau was on "supervised release" following a criminal conviction for bank robbery in federal court and service of a prison term. He also had a pending charge in Horry County. If he were convicted of the pending charge, it would serve as a violation of his "supervised release." However, Michau claimed he had no agreement with the state to receive favorable treatment on his pending charge in exchange for his testimony. App. 84, line 24 – App. 85, line 4; App. 90, line 13 – App. 91, line 1.

approximately eight to ten inches in length. App. 73, line 25 – App. 74, line 8. The men demanded money, which Michau gave to them. App. 74, lines 14-18; App. 75, lines 12-13. Additionally, Michau stated the men asked for his money and his cell phone. Michau gave them $60 from his wallet, but pleaded with them not to take his cell phone. App. 75, lines 13-19. Michau promised not to call the police for ten minutes if they allowed him to keep his phone. App. 76, lines 16-21.

Prior to the men leaving, one man shook Michau's hand, apologized, and explained he needed money to buy Christmas presents for his child. App. 76, lines 3-15. Michau noted the men were unable to make a quick escape because "they ran into this walled area and couldn't get out." App. 82, lines 6-20. Michau called 911 and the hotel owner "after the two guys had run across the street and they disappeared somewhere back behind the VFW club." App. 85, lines 5-9. Michau's only description of the men was that one was taller and had a darker complexion. App. 82, lines 21-25. He was unable to identify the robbers.

After Michau testified, the solicitor withdrew the objection to the presentation of an alibi defense "out of an abundance of caution." App. 93, line 25 – App. 94, line 6. Thus, trial counsel was free to present an alibi defense through witnesses and argument; however, trial counsel failed to do so despite the ready availability of the witnesses present in the courtroom.

Petitioner and Genene[4] Alston were dating in December 2008. Alston was working at the Carolinian Inn at the time. App. 109, lines 6-25.[5] Alston quit when the owner accused her of stealing money. App. 110, lines 1-21. Alston told Petitioner what happened and explained she

[4] The court reporter for the trial spelled this witness's name as "Genene." The court reporter for the PCR hearing spelled the witness's name as "Janine."

[5] Alston testified pursuant to a "qualified immunity" agreement. As long as she testified consistently with statements she previously made to the police, then her testimony at the trial would not be used against her. App. 114, line 2 – App. 117, line 5; App. 122, lines 11-18.

was upset over the incident. App. 110, line 22 – App. 111, line 6. While blowing off steam, Alston said that "karma need[ed] to come back on [the owner]" and that "somebody needed to rob her" and "egg her car." App. 111, lines 6-10. Alston claimed that she told Petitioner and his cousin, Shane Pringle, how the lobby was laid out, that the doors were unlocked, and the location of the desk. App. 111, lines 11-19; App. 123, lines 17-25. Alston also claimed that she told Petitioner that Mr. Mingo would be working, but Mr. Lee was working. Despite her claim that she told Petitioner about Mr. Mingo, she claimed she described Mr. Lee to him. App. 120, lines 20-24.

When asked if she had contact with Petitioner on December 23, 2008, Alston responded that she and he went bowling "that night and then later you would say early morning around – I can't give the specific time but between 3 and 5" she and Petitioner exchanged text messages. App. 121, lines 2-11. Thereafter, the following exchange occurred:

Q. What did the text messages say?

A. That I lied about who would be working and I wanted – I asked him what did he do and why was he out so late.

Q. Did he respond to you?

A. Yes, he did.

Q. What did he say?

A. He told me that he was out riding around and he was just out riding around him and Shane.

App. 121, lines 12-19. When Alston learned of the robbery from reading the newspaper, she asked Petitioner about it repeatedly. Petitioner always denied any involvement. App. 122, lines 1-6.

The state's final witness, Shane Pringle, testified that he did not go with Petitioner to the Carolinian Inn on December 23, 2008. He admitted that he robbed the hotel, but he testified that Petitioner was not his accomplice for the robbery. App. 125, line 23 – App. 127, line 2. Shane spent time with Petitioner and his family during Christmas of 2008. App. 127, lines 17-25. Shane admitted giving a statement to Investigator Floyd and speaking with Investigator Brown in the solicitor's office. App. 127, lines 3-13. When the solicitor attempted to impeach Shane with his alleged statements that Petitioner was involved with the robbery, Shane responded that he told the investigator "if he think we done it we done it." App. 129, lines 6-12. Shane explained that Petitioner's only part in the robbery was giving him the idea. According to Shane, Petitioner "did not participate in it." App. 131, lines 1-11.

During a break, Shane listened to the audio-recorded statements he gave to law enforcement. App. 140, lines 3-7. Thereafter, Shane admitted that when he was questioned by Investigator Floyd, he implicated Petitioner in the robbery. App. 142, line 16 – App. 143, line 21. However, Shane also admitted that even when he was being interrogated by Investigator Floyd, he said that Petitioner "was not involved in the robbery." App. 144, lines 2-5.

Thus, the state's case consisted of (1) the hotel desk clerk testifying that he was robbed at knifepoint by two unknown black males, (2) an alleged co-conspirator denying Petitioner was involved, but admitting that he had inculpated Petitioner in his statement to police, and (3) Petitioner's former girlfriend, who had worked at the hotel and wanted vengeance for being accused of theft. Recounting this evidence in closing, the solicitor tried to bolster it by claiming the text message from Petitioner to Alston said "You lied about who would be working." App. 156, lines 10-12. Trial counsel objected to this argument as a "misstatement of the evidence." App. 156, line 13. Although the trial judge overruled the objection, the record reveals that trail

counsel was correct – Alston did not testify that Petitioner's text said she lied about the identity of the desk clerk. App. 156, line 14; App. 121, lines 12-19. In fact, trial counsel disputed the solicitor's statement early on in his closing argument: "The lady, Genene, what she said on the witness stand was and I think the solicitor had said something about my client having texted her about – something about a clerk. That lady never said that on the witness stand. If you have a doubt about it, you can ask to play that testimony back when you're in the jury room." App. 161, line 19 – App. 162, lines 22.

Relevant facts from the PCR hearing

Trial counsel candidly admitted – repeatedly - that he did not "have a good defense strategy in this case." App. 270, line 22 – App. 271, line 3; App. 288, lines 22-23; App. 290, line 2; App. 292, lines 3-4; App. 292, lines 14-15. In fact, he did not "see a strategy that [he] could come up with." App. 271, lines 12-14. Counsel's claim that he could not develop a strategy was based, at least in part, on his faulty memory of the evidence – particularly the testimony of Alston.

Despite the clear record evidence to the contrary and trial counsel's objection and argument to the contrary, at the PCR hearing, trial counsel claimed that Alston testified that Petitioner "texted her the night of the robbery, like 4:00 or five o'clock in the morning, that she had told [him] the wrong person was going to be working at the motel. So I guess the jury would figure the only way in the world he would know that is if he had just got through robbing the motel." App. 266, lines 17-23; App. 290, lines 10-19. In fact, trial counsel recalled the testimony as being that Petitioner "texted her at 4:00 or five o'clock in the morning, exactly of the time of the robbery and says that the person you told me was working as the desk clerk was not there. How in the world would [he] know that other than having robbed the place?" App.

271, lines 19-23. Based on that supposed evidence, trial counsel "had no brains enough to have a valid defense that would let us get a not-guilty verdict." App. 271, lines 24-25.

In light of the file's disappearance, trial counsel was unable to testify with any specificity regarding his pre-trial meetings with Petitioner. App. 267, lines 9-15. Trial counsel admitted that Petitioner told him "his mama and his sister and a cousin would be an alibi." Therefore, months before the trial, trial counsel sent out "the little form" to get witness statements. App. 269, lines 1-7; App. 239-242. Trial counsel did not remember if he talked to any of the witnesses personally, but he was certain he did not hire an investigator. App. 274, lines 17-22. He also did not recall if he "called each of these people on the phone and talked with them and got more nitty-gritty notes." App. 280, line 22 – App. 281, line 4.

However, trial counsel claimed that his handwritten notes on the witness statements indicated reasons why the witnesses would not be called:

> Thankfully, attached to [Petitioner]'s PCR application is the statements where during the week of trial I wrote down at the top on Shavon, the cousin, where I've got December the 15th, 2009. That little triangle there means the defendant. The defendant is telling me, my client, [Petitioner], do not use Shavon, she does not know where I was 4:00 to 5:00 a.m. on December 23rd, the time of the robbery, 2008.

App. 269, lines 16-23; App. 272, lines 10-16. Further, he claimed his handwritten note on the statement by Carlette Thompson indicated that Petitioner and his mother did not want her to testify because she was confused on the dates and times and she was nervous. App. 272, lines 17-23.

Turning to Petitioner's mother as an alibi witness, trial counsel claimed Petitioner indicated his mother had a criminal record and was on probation. App. 273, lines 17-20.

Further, trial counsel indicated that mother's statement would harm Petitioner because she placed Petitioner with Shane on the day of the robbery. App. 274, lines 1-16.[6]

Finally, trial counsel explained that none of the witnesses' statements "had anything to do with 4:00 to five o'clock in the morning on Tuesday morning, the day of the robbery, the day and time." Therefore, even if he had called them to testify, "none of them knew anything on that time." App. 273, lines 7-13; App. 273, lines 20-25; App. 281, lines 9-20. Trial counsel called the defense proposed by Petitioner "a stupid no-alibi defense." App. 292, lines 16-24. He elaborated: "It was not valid. It was not like I had a good alibi defense and I just chose not to call it because I was needing to go to the golf course or I was trying to sell out my client. We had no valid alibi defense." App. 293, lines 1-4.

Regarding whether the witnesses would have testified that Petitioner was asleep at the time of the robbery, which is what he represented to the trial judge, trial counsel testified as follows at the PCR hearing:

> Q. And you said to the court that they were in their house - - he was in his house asleep that night of the robbery; right?
>
> A. That's what the client was saying, and he was saying his - - or that the – we were hoping, or he was hoping, or we were dreaming, or whatever we were doing, that the alibi witnesses would say; if they were going to say that.

[6] Regarding the allocation of authority between client and lawyer, trial counsel testified that he did not have the ability to override the wishes of his client. He explained that if Petitioner had instructed him to call his sister as a witness and he refused, then Petitioner would have accused him of "selling" him out or being "dumb." If he refused to call the witness because he was the "brilliant lawyer in the case" and Petitioner was "just a dumb client that has no say-so in [his] own case, and [he], Reuben Goude, His Majesty," refused to call the witness, then Petitioner would have moved to relieve him as counsel based on trial counsel being "dumb," "selling [him] out," being "crooked or ignorant, or whatever he was going to say." App. 294, lines 5-23. Trial counsel explained he would never do that because he likes his clients, tries to do a good job for them, is "a good lawyer and an honest lawyer." App. 294, line 24 – App. 295, line 2.

Q. Do you have any inclination that they wouldn't have said that, that he was sleeping that night?

A. I have an inclination that they did not say that or I would have probably called them as a witness. ... If I had - - because I talked with them, or would have, looks like I made those notes, and if they had said we saw him at 4:00 or five o'clock in the morning on Tuesday morning, December the 23rd, we walked by his room or he was using the bathroom or he went to bed at two o'clock Monday night in that bedroom and he came out of it at 6:00 a.m. Tuesday morning and we didn't hear him walking down the hall during the evening - - if they had said something like that, probably I would have used them.

App. 281, line 21 – App. 283, line 2.

In light of trial counsel's comments about the possibility of a witness stating that Petitioner was in his bedroom all night or others in the home did not hear him walking down the hall during the evening, PCR counsel asked if trial counsel knew where Petitioner lived. Trial counsel was forced to admit he did not even know where the road was, much less Petitioner's actual home. App. 283, lines 3-22. Despite not knowing the location of Petitioner's home, trial counsel claimed he "would know roughly that it's twenty miles, give or take, from the Carolinian Inn in Georgetown." App. 284, lines 2-3.

Petitioner testified that he met with trial counsel "[a]bout four times." App. 301, lines 2-4. Although trial counsel vaguely discussed the evidence with him, trial counsel did not show him the discovery in the case. App. 301, lines 15-21. The only defense strategy the two discussed was presenting Petitioner's alibi defense. App. 302, lines 11-19. Petitioner wanted all of his alibi witnesses to testify, and he never told trial counsel that he did not want them to testify at the trial. App. 302, line 20 – App. 303, line 1; App. 304, line. In the middle of the trial, trial counsel told Petitioner he was not going to call Petitioner's alibi witnesses. "At first he was saying that they would probably harm the case." Also, trial counsel was not sure what the

witnesses would say because he "didn't really have a chance to talk to them face-to-face." App. 303, lines 11-16; App. 303, line 24 – App. 304, line 8.

When the robbery occurred, Petitioner was at his mom's house, where he was visiting for the holidays, in "the middle of nowhere" on the outskirts of Andrews. The family lived on five-acres with the closest neighbor approximately 300 yards away. The town of Andrews was a four-to-five minute drive away. App. 306, line 21 – App. 307, line 22. Due to the rural area, there was almost no traffic on the road. App. 307, lines 23-25. The home was a double-wide trailer with four bedrooms and very thin walls. Those inside the home could hear people driving up and driving away from the home. App. 308, lines 6-8; App. 309, lines 1-8. Trial counsel conducted no investigation into the circumstances and never asked Petitioner any questions about the home. App. 313, line 11 – App. 314, line 12.

On Monday night preceding the robbery, Petitioner went bowling and arrived home around 11:30 or midnight. He then went to eat with a cousin named Ronald in Georgetown. He returned home around 1:30 a.m. He did not have a key to the home so he called his sister, who was sleeping, to let him in. He then played a video game until he fell asleep. He was unsure what time he feel asleep, but when pressed for a time, he guessed he played the game for "[p]robably about two-and-a-half hours." In other words, he estimated he went to sleep around 4:00 a.m. App. 309, line 15 – App. 310, line 12.

Petitioner's mother, Carla Thompson, testified at the PCR hearing. App. 316, lines 6-8. She never spoke with trial counsel. App. 316, lines 13-14; App. 317, lines 18-20. However, she spoke with his paralegal. App. 317, line 21 – App. 318, line 24. She saw Petitioner on Tuesday morning, the morning of the robbery, "probably around about 2:30, three o'clock, 3:30." She remembered that she was still up wrapping Christmas gifts. App. 319, lines 3-6. When she went

to sleep, Petitioner was still in the house and nothing woke her up during the night. Further, when she woke up the next day, Petitioner was still in the house. App. 321, lines 15-22. She recalled Petitioner was playing a video game. App. 322, lines 5-10. She was sure Petitioner was home that night. App. 322, lines 11-24. If she had been called to testify, she would have said that Petitioner was in her home. App. 323, lines 3-5.

She further explained that her home is a double-wide trailer. App. 319, lines 20-24. She could easily hear cars pulling up outside, and because she was a light sleeper, she heard everything that occurred. App. 320, lines 1-8. Also, the family owned dogs who barked whenever anyone entered the yard. App. 319, lines 7-11; App. 320, line 9 – App. 321, line 5. Just as Petitioner said, there was not much traffic on their rural road. App. 321, lines 6-7. Further, she readily admitted she had a criminal record for habitual traffic offender, which was the only criminal offense on her record, as stipulated to by the state. App. 324, line 15 – App. 325, line 25.

Carlette Thompson, Petitioner's sister, also testified at the PCR hearing. App. 334, lines 6-8. On Tuesday morning, she saw Petitioner "around one o'clock, 1:30" when Petitioner called her to open the door for him. App. 335, lines 1-10. After she let Petitioner in, the two went to the room and talked. App. 335, lines 13-19. She did not recall how long the two talked, but she knew that Petitioner was still in the home when she woke up the next morning. App. 335, line 12 – App. 336, line 4. Further, and more to the point, she testified that Petitioner never left during the night. She knew this "for a fact." App. 336, lines 8-11. Had she been called to testify at the trial, she would have testified consistently with her PCR testimony. App. 337, lines 2-5.

ARGUMENT

I. Trial counsel's failure to call two witnesses to testify in support of Petitioner's alibi violated Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments where the prosecution presented no physical evidence linking Petitioner to the crime and the only evidence against Petitioner were inconsistent statements by a co-defendant.

Relevant facts

Order denying relief

According to the order denying relief, trial counsel testified Petitioner "did not wish to call his mother as a witness because she had a prior criminal record." App. 347. Further, trial counsel asserted that Petitioner "did not want to call his sister to testimony on his behalf because she was nervous and confused." App. 347. "Trial counsel did not call either of these witnesses because neither could positively establish an alibi." App. 347. In order to "positively establish an alibi," Petitioner would need witnesses who could establish Petitioner's "exact whereabouts at the time of the robbery." App. 347. Although the PCR court stated that Petitioner's "mother could not account for [Petitioner] after 1:30 AM the night of the robbery," the PCR court acknowledged that Mother initially testified she went to bed at 4:00 AM and later stated that she was up between 4:00 AM and 5:00 AM and saw Petitioner playing video games. App. 347; App. 349.

The PCR judge found that trial counsel "articulated valid strategic reasons for not calling either of these witnesses at trial." Additionally, the order stated that Petitioner instructed Petitioner not to call the witnesses and that Petitioner "cannot now complain that trial counsel did not utilize them." App. 350. Further, the PCR judge determined that Petitioner could not

show prejudice because "their testimony at the evidentiary hearing does not establish an alibi." App. 351. Under the PCR judge's formulation, in order for a witness to provide an alibi, the testimony must prove that the defendant was at a place so distant that his participating in the crime was impossible. App. 351 (citing State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980)). Sister did not establish an alibi because she "could not account for Petitioner's whereabouts" between 1:30 a.m. and later in the morning. In essence, "[b]ecause she could not testimony to [Petitioner]'s whereabouts immediately prior to 4:50 AM, [Petitioner]'s sister's testimony would not have provided an alibi" for Petitioner. App. 351. Further, the PCR court found Mother's testimony failed to establish an alibi because "[h]er testimony changed between direct and cross-examination regarding key details, including what times she was asleep and what times she actually saw [Petitioner] in her house." App. 351. Regarding mother's testimony, the PCR court noted

> her testimony did not account for his whereabouts leading up to the time of the robbery. She initially testified she went to sleep at 4:00 AM, which would have left time for [Petitioner] to have traveled the roughly twenty (20) miles to the crime scene. [Petitioner]'s mother later testified she recalled being awake between 4:00 AM and 5:00 AM and she saw [Petitioner] awake and playing video games during that hour. [Petitioner]'s own testimony placed him asleep at approximately 3:00 AM.

App. 352 (internal citation omitted). Thus, the court concluded that Mother's testimony would have directly contradicted Petitioner's testimony and failed to establish an alibi. App. 352.

Motion to Alter or Amend/Motion for Reconsideration

In his motion to alter or amend/motion for reconsideration, Petitioner moved the court to reconsider the testimony at the evidentiary hearing. Petitioner argued the witnesses provided an alibi during the time of the armed robbery by testifying that he was at home and that they would have heard him if he left. App. 354. Further, Petitioner argued that trial counsel did not have

"valid strategic reasons" for not calling the alibi witnesses because he testified that he did not have any strategy or defense in the case. App. 355. Petitioner argued it was "unreasonable to choose 'no defense' over an alibi defense." App. 355.

Order denying the motion

Without elaboration, the PCR court denied the motion to alter or amend/motion for reconsideration. However, the PCR court noted a review of the record, motions and the state's return preceded the decision to deny the motion. App. 358.

Discussion

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Without question, a trial attorney "'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Walker v. State,

407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. This Court has held that if trial counsel articulates a valid reason for employing certain strategy and the strategy used satisfies an objective standard of reasonableness, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).[7]

In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be

[7] See also Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002)(finding trial counsel deficient for failing to object to the state's vouching for the credibility of the witness where counsel stated he decided not to object based upon strategy, but never articulated that strategy); Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002)(holding that trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim – the testimony would help show the allegations were vague – was not reasonable because the hearsay corroborated the victim's testimony); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001)(holding trial counsel's failure to object to prejudicial hearsay because he did not want to confuse or upset the jury was not valid strategy); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992)(finding a failure to object to the trial judge's comments encouraging the jury to deliberate early was not a reasonable strategic decision).

physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147.

Trial counsel's failure to present Petitioner's alibi witnesses and defense violated Petitioner's right to the effective assistance of counsel. Trial counsel was aware of Petitioner's alibi and obtained statements from the witnesses by sending out "the little forms." However, trial counsel failed to present the alibi. Counsel was aware that Petitioner's sister and mother could provide testimony to support an alibi, but he refused to present their testimony. Trial counsel conducted no further investigation of the alibi, such as interviewing the witnesses personally. Trial counsel's reasons for failing to call the witnesses are not reasonable strategic choices. Despite his claim that he decided not to call Petitioner's mother due to her criminal record, the PCR transcript revealed her record was minor and perhaps not admissible. Certainly, her one prior criminal conviction for habitual traffic offender had nothing to do with her honesty and trustworthiness. Trial counsel's failure to present the alibi witnesses and defense denied Petitioner his right to the effective assistance of counsel.

The PCR court erred in concluded that neither witness could positively establish an alibi for Petitioner – this was the same erroneous conclusion drawn by trial counsel. According to the PCR court, Petitioner would need witnesses to establish his exact whereabouts at the time of the robbery and his mother and sister could not do so. However, Petitioner's mother and sister testified that he was at home during the time of the robbery. The evidence presented at trial failed to establish a definite time for the armed robbery. Michau testified the robbery occurred between 4 and 5 a.m. The responding investigator testified that he received the call at 4:30 or 5. Further, Michau testified that he waited some time to call for help because he had made a deal with the robbers to do so if they allowed him to keep his phone. Thus, the time of the actual

robbery was an elusive point. The armed robbery was not at 4:50 a.m. as concluded by the PCR judge. Petitioner's mother and sister placed him inside the home in Andrews between 4 a.m. and 5 a.m., not in Georgetown. Further, the PCR court concluded that Petitioner's testimony placed him asleep at approximately 3:00 a.m., which conflicted with Mother's testimony that she saw him awake between 4:00 and 5:00. This is error. Petitioner's testimony was that he fell asleep about two-and-a-half hours after arriving home at 1:30; therefore, he fell asleep at approximately 4 a.m. The approximations of the times would demonstrate the consistency of the testimony among the witnesses. Further, both witnesses said they were certain Petitioner had not left the home. Trial counsel's reasons for not calling the witnesses to testify was not based on sound strategy because he failed to conduct an adequate investigation, as discussed infra.

II. Trial counsel provided ineffective assistance by failing to conduct a pre-trial investigation violating Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments where trial counsel had no strategy at trial and a pre-trial investigation would have supported presentation of an alibi defense.

Relevant facts

Order denying relief

The order denying relief addressed this issue only tangentially; therefore, Petitioner filed a motion to alter or amend/motion for reconsideration specifically requesting consideration of this claim. See infra. The order noted that trial counsel "could not recall how many meetings he had with [Petitioner] because the public defender's office misplaced his file." App. 347. However, trial counsel "recalled discussing the evidence, as well as reviewing the police reports, with [Petitioner]." App. 347. Petitioner provided names of potential alibi witnesses to trial counsel, who "had each of the witnesses prepare statements detailing their knowledge of the case." App. 347. Petitioner testified that he met with trial counsel only four times, and the two did not review the discovery materials. App. 348.

The PCR judge held trial counsel had Petitioner's alibi witnesses prepare statements, which trial counsel reviewed prior to trial. Additionally, trial counsel had the witnesses present in the courtroom and was prepared to present their testimony. Thus, the PCR judge concluded, "[t]rial counsel's investigation and preparation of [Petitioner]'s witnesses was reasonable under the circumstances." App. 350.

Motion to Alter or Amend/Motion for Reconsideration

Petitioner moved the court to consider his ground that trial counsel failed to conduct a pre-trial investigation regarding his alibi. Petitioner noted that "much of the testimony dealt with

the failure of trial counsel to conduct a pretrial investigation." App. 355. An investigation would have revealed Mother's home had "thin walls" permitting the occupants to hear easily within the home and outside the home. The investigation would have revealed the home's remote location as well. "These facts would have been of assistance in determining whether to implement the alibi." App. 355.

Order denying the motion

The PCR court denied the motion to alter or amend/motion for reconsideration without explanation except to note a review of the record, motions and the state's return preceded the decision to deny the motion. App. 358.

Discussion

As explained, trial counsel "'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. "[C]ounsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment." Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id. at 265, 763 S.E.2d at 634 (quoting Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2007)).

Trial counsel completely failed to conduct a reasonable investigation in this case. Although he sent out "the little forms" to obtain witness statements to support Petitioner's alibi,

he never interviewed the witnesses personally. He never sought to obtain from the alibi witnesses the evidence or the testimony that he needed to present an alibi defense. Despite trial counsel's testimony at the PCR that the evidence against Petitioner was staggering, the trial record reveals the evidence was modest at best. The only direct evidence against Petitioner was Shane's statement to police that Petitioner was involved. Shane disavowed that statement at trial and said that Petitioner was not involved. The only circumstantial evidence against Petitioner was the testimony of Alston that she was upset about being accused of theft and had suggested someone rob the hotel in front of Petitioner and Shane. There was no physical evidence linking Petitioner to the crime – no fingerprints, no video, no DNA, no footprints, no fibers, no hair. Petitioner was not caught with ill-gotten gains from the robbery. In fact, no one testified to Petitioner having any of the loot. The sole eyewitness to the crime – Michau – could not identify Petitioner as the robber. No one testified to having loaned Petitioner or Shane a car on the morning in question. Unquestionably, the evidence was underwhelming. Trial counsel's failure to investigate was unreasonable. This failure was deficient performance prejudicial to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Kristi Lea Harrington, Circuit Court Judge

DONOVAN RAHEAM PRINGLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Donovan R. Pringle #338600, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of July, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.