STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Kristi Lea Harrington, Circuit Court Judge

CRYSTAL TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000098

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated when defense counsel failed to subpoena a co-defendant, Paige Furniss, who would have testified that Petitioner was not involved in the plan to decoy and rob Donald Rabon and that Petitioner was unaware that her co-defendants had borrowed her car to effectuate the robbery and subsequent murder?

STATEMENT

On August 13, 2008, Petitioner arranged to meet her ex-boyfriend, Jeff James, at a bar they regularly went to in Horry County called Easy's. App. 519. After making plans to meet James, Petitioner was contacted by longtime friend Paige Furniss. Petitioner and Furniss also agreed to meet later that day and go to Easy's. App.367.

When Petitioner and Furniss met, Furniss had her brother, Charlie Skipper and friends Luther Oxendine, and Jamie Dean White, with her. App. 325. Petitioner did not know Skipper, Oxendine, or White. *Id.* The four then rode with Petitioner to Easy's where James was waiting for Petitioner in the parking lot. *Id.*

The group went into the bar, ordered drinks, and was later joined by Stacey Johnson, a friend of Furniss, Oxendine, White, and Skipper. App. 328 - 329. Petitioner did not know Johnson. *Id.* At Furniss' prompting, Petitioner told the group that another Easy's regular, Donald Rabon, frequently bought her drinks and suggested that the other women might be able to receive free drinks from him. App. 326 -327.

Johnson befriended Rabon and the two quietly left Easy's in Johnson's car. App. 328 - 330. Shortly thereafter, Furniss, Skipper, Oxendine, and White asked to borrow Petitioner's car in order to go buy cigarettes. Petitioner handed them the keys and remained with James at the bar. App. 545. When the four returned, they gave Petitioner twenty dollars for gas money and then left in Johnson's car. App. 376 – 378. Petitioner and James remained at Easy's until closing time. App. 545.

In the early morning hours of August 14, 2008, Rabon's body was found on a dirt road just outside of Aynor, roughly a half mile from Easy's, with all of his pockets turned outward. App. 284

– 285. He died from a single small caliber gunshot wound to the chest. App. 257. Police discovered Rabon's vehicle at Easy's parking lot. App. 290 – 293.

Indictment

On May 28, 2009, Petitioner was indicted by the Horry County Grand Jury on two counts of being an accessory before the fact of a felony for the robbery and murder of Ronald Rabon. App. 132 – 133; App. 867-868.

On September 13, 2010, Petitioner and co-defendant Charlie Skipper proceeded to trial before the Honorable Thomas W. Cooper Jr. and a jury. Petitioner was represented by R. Scott Joye. The State was represented by Lawrence R. Filiberto and Skipper was represented by Kia Wilson.

Skipper Pleads Guilty

Furniss, Oxendine, White, and Johnson all entered into proffer agreements with the State. App. 240 - 245. Before *voir dire*, Skipper agreed to plead guilty to armed robbery and murder and to testify against Petitioner. App. 92. Consistent with the State's recitation of the facts, Skipper admitted that he shot Rabon after he, White, Oxendine, Johnson, and Furniss robbed him. App. 110 – 112.

As part of his admission, Skipper claimed that Furniss and Petitioner identified Rabon as a good robbery victim, "they both picked him. That's how it came about. That's how it was him". App. 112, ll. 24 – 113, ll. 2. He further alleged that Petitioner told the others where Johnson should lead Rabon and made her vehicle available for their use. App. 113 – 115. The court accepted Skipper's guilty plea, but waited to sentence him until after Petitioner's trial.

State's Theory of the Case

The State believed that Petitioner – despite not having a prior criminal record – was the instigator of the robbery and identified Rabon as a target. App. 236 - 239. The State conceded that

Petitioner was not present when Rabon was robbed and shot, but posited that Petitioner allowed her former co-defendants to borrow her car knowing that they were going to rob Rabon. *Id.*

The State claimed that Petitioner even suggested the isolated dirt road that Johnson should lure Rabon to with promises of sex. *Id.* The State depended on the testimony of Petitioner's former co-defendants, all had admitted guilt and entered into proffer agreements with the State.

Testimony of Jamie Dean White

White claimed that after the group arrived at Easy's, Furniss and Petitioner "brung [*sic*] up the subject about Mr. Rabon having money on him at the time." App. 327, ll. 17-23. White alleged that Petitioner told the group that Rabon was a good robbery target. *Id.*

White claimed that Johnson and Skipper talked privately in her car immediately upon her arrival. App. 329 – 330. According to White, Petitioner gave him her car keys knowing that the others were going to rob Rabon. *Id.* When the others pulled up to Johnson and Rabon, Skipper pulled out his gun, forced Rabon out of the car, and demanded money from him. App. 332 – 335. White took the money that Rabon handed over and Skipper unexpectedly shot Rabon. *Id.*

White averred that everyone involved in the robbery, including Petitioner, received one hundred dollars. *Id.* White recalled that Oxendine went into the bar, handed Petitioner her keys and her share of the money, and the group left in Johnsons' car. *Id.*

On cross-examination, Defense counsel highlighted White's first statement to police, taken before the proffer agreement, where he stated that Petitioner likely believed the group to be joking about the robbery. App. 345. White also admitted that Furniss was instigator of the robbery. App. 347. White attempted to claim that a letter he wrote to Petitioner stating that he knew she "didn't have anything to do with this," only referred to her not being present for the robbery. App. 357, ll. 10-23.

Testimony of Luther Oxendine

Like White, Oxendine also testified pursuant to a proffer agreement. Oxendine claimed that Furniss was the instigator of the robbery, but that Petitioner had identified Rabon. App. 370. Unlike White, Oxendine averred that the whole group – including Petitioner – went to Johnson's car and planned the robbery. App. 371. However, Oxendine later indicated that Petitioner was not actually in the car while the others were planning the robbery. *Id.*

Oxendine testified that Furniss asked to borrow Petitioner's car to buy cigarettes. App. 373 - 374. Crucially, Oxendine testified that when the group returned to Easy's, he went inside and gave Petitioner her keys and twenty-dollars for gas. App. 376 – App. 378. Not the hundred dollars that White claimed.

On cross-examination, he admitted that in his first post-proffer statement to law enforcement he claimed to have heard only "bits and pieces" of Furniss's robbery plan. App. 391 – 393. Oxendine also reiterated that Petitioner only received twenty dollars for gas money. App. 396 – 398.

Testimony of Charles Skipper

Having just pled guilty, Skipper recalled that Furniss first brought up the possibility of robbing someone. App. 410 – 412. Skipper alleged Petitioner stated that Rabon would regularly buy her drinks and that he would be a good robbery target. *Id.*

Skipper claimed that Furniss and Petitioner tried to entice Rabon into buying them drinks, but were unsuccessful. App. 413. When Johnson arrived: she, Skipper, Furniss, Oxendine, and White sat in Johnson's car, smoked marijuana, and formulated the plan to rob Rabon. App. 413 – App. 415. Like Oxendine, Skipper initially testified that Petitioner was not present for this conversation. *Id.*

The State, indicating its dissatisfaction with that answer, steered Skipper into eventually "remembering" that Petitioner was actually present for the discussion about robbing Rabon. *Id.* Skipper admitted that he shot Rabon following the robbery and claimed he pled guilty because, "I just believe that -- you know -- it was wrong when -- you know -- that everybody needs to -- it should be heard -- be known." App. 419, ll.24 – 422, ll. 2.

On cross-examination, Skipper unequivocally stated that Furniss instigated robbery because she had an outstanding electric bill and needed money. App. 422. Skipper said Petitioner had identified Rabon as someone who would pay girls for sex and that Petitioner tried to introduce Furniss to Rabon for that purpose. App. 424 - 425. Skipper also admitted that Petitioner had identified the dirt road, where Rabon's body was discovered, as the place where Furniss could take Rabon in the event he agreed to pay her for sex. *Id.*

Testimony of Investigator Tim Troxell

Troxell interviewed Petitioner after Rabon's car was found in Easy's parking lot. App. 469 - 471. Troxell claimed that Petitioner told him that she had identified Rabon as someone who carried money to Furniss and the others. *Id.* Troxell conceded that Petitioner had done so in the context of a joke about robbing Rabon. App. 472 - 473.

Troxell testified that Petitioner told him she advised both Furniss and Johnson to expose "some cleavage" in an effort to get Rabon's attention. App. 474. The State asked Troxell whether Petitioner "ever acknowledged that she knew that there was going to be a robbery?" Troxell worded his response carefully, "[s]he acknowledged several times that there was conversations of a robbery." App. 474, ll. 21 - App. 475, ll. 5. Troxell ventured that Petitioner had hoped to pay off her past due electric bill with her share of the robbery money. App. 491.

During cross-examination, Troxell granted that Petitioner always maintained that she believed the robbery discussion was a joke and that she had introduced Rabon to Furniss and Johnson because she knew Rabon would buy the women drinks and, perhaps, proposition them for sex. App. 476 - 478.

Defense's Theory of the Case

Defense counsel argued at trial that Petitioner had no knowledge of the others' robbery plans. App. 240 - 249. The defense stressed that Petitioner only knew Furniss and that Oxendine, White, Skipper, and Johnson were strangers. App. 244 - 247. In his opening remarks, defense counsel posited that Furniss, not Petitioner, was about to have her electricity turned off and that she orchestrated the robbery because she needed money. App. 244.

In attempting to prepare the jury for the testimony of Petitioner's former co-defendants, counsel highlighted that each one was testifying under a proffer agreement and that they hoped to receive a lesser sentence in exchange for implicating Petitioner. App. 246 - 249. It seemed implausible that Petitioner, with no past criminal record, would suggest and then assist a group of strangers in decoying and robbing a man who was a regular at the same bar that Petitioner frequented on a weekly-basis. *Id.*

Testimony of Jeff James

James testified that on the night of the incident, Petitioner had asked for him to meet her at Easy's to discuss their recent breakup. App. 518 - App. 519. James arrived at Easy's first. When Petitioner and the others arrived, James was talking with a local man about a handgun that he had for sale. App. 520 - App. 521.

Once inside Easy's, he and Petitioner mostly talked to each other. App. 526 - 528. Neither paid much attention to the others in the group. *Id.* James did not recall Petitioner ever going outside and he did not remember Petitioner ever speaking with Johnson. App. 530 - 532.

James recalled that Furniss and the others left Easy's in Petitioner's car to go buy cigarettes. App. 533. James believed that the group was only gone about thirty minutes and that Oxendine simply walked, handed Petitioner her car keys and left. App. 535 - 537. Petitioner and James remained in the bar until one in the morning. App. 538.

James testified that Petitioner acted normally throughout the night. App. 533 - 534. On cross-examination, James conceded that Petitioner told him earlier in the day that she needed money to pay an overdue electric bill. App. 546. James also noted that it was not unusual for Petitioner to ask him for money and that he frequently gave her money while they were dating. App. 547.

Jury Deliberations, Verdict, and Appeal

During deliberations, the jury sent out a note requesting transcripts of the testimony of five witnesses: White, Oxendine, Skipper, James, and Troxell. App. 701. This request encompassed almost all of the testimony bearing directly on Petitioner's alleged involvement in the robbery.

The trial court explained that transcripts would not be available and refused to replay what amounted to a full day of testimony. App. 707 - 710. The court encouraged the jury to consider what specific portions of the testimony they wished to hear. *Id.* Instead of narrowing the request; jurors deliberated for another forty-five minutes before reaching a verdict. App. 710.

The jury found Petitioner not guilty of accessory before the fact of murder, but guilty of accessory before the fact of armed robbery. App. 713, ll. 10-20. The trial court sentenced her to sixteen years incarceration. App. 745, ll. 6-9.

The Court of Appeals affirmed her conviction by an unpublished opinion filed October 24, 2012. *State v. Turner*, Opinion No. 2012-UP-562 (Ct. App. Filed October 24, 2012).

PCR Application

On June 26, 2013, Petitioner filed an application for post-conviction relief alleging that defense counsel was ineffective for, among other allegations, failing to call Paige Furniss as a witness for the defense. App. 767 - 772. The State filed a Return on February 27, 2014. App. 773-777.

Evidentiary Hearing

An evidentiary hearing was held on August 28, 2014 before the Honorable Kristy L. Harrington. App. 778 - 858. T. Kirk Truslow represented Petitioner and Assistant Attorney General Joshua L. Thomas represented the State. Petitioner, Paige Furniss, and defense counsel testified at the hearing.

Testimony of Petitioner

Petitioner testified that the State had all five co-defendants listed as witnesses. App, 793. White, Oxendine, and Skipper were the only three to take the stand at trial. App. 796 - 798. Petitioner remembered that the State did not call Furniss or Johnson; this concerned her as "[t]hose were the two [witnesses] who I thought could help me in the situation, because they knew that I wasn't responsible or knew anything about the incident." App. 797, ll. 16-19. Petitioner recalled that defense counsel could not call them as witnesses because he had failed to subpoena them. *Id.* at ll. 23-25.

Testimony of Paige Furniss

Furniss testified at the PCR hearing that after Petitioner's trial, she pled guilty to armed robbery and was sentenced to eleven years imprisonment. App. 812 - 813. Furniss admitted that

she had initially lied to police when she told them that Petitioner was involved in planning the robbery. She explained that, at the time, she was willing to tell law enforcement anything that she thought would improve her position. *Id.*

Furniss recalled that the State wanted testimony implicating Petitioner in the robbery. App. 814. Furniss stated that - had she been called at trial - her testimony would have been different from her first statement. *Id.* She would have testified truthfully that Petitioner was not involved in the robbery, but that it was Skipper's idea to rob Rabon. App. 815. Furniss said that Petitioner had simply told the others that Rabon "would . . . buy pretty girls drinks." App. 815.

Furniss expounded that, based on this comment, Skipper planned the robbery and recruited Furniss, White, Oxendine, and Johnson. App. 816. Furniss recalled that Skipper surprised the other conspirators by shooting Rabon after the robbery. App. 818. Furniss stated that they took one thousand forty dollars from Rabon, but that Petitioner was only given twenty dollars for gas money. *Id.* On cross-examination, Furniss again admitted that she lied in her statement to police and that, had she been called at trial, she would have testified that Petitioner had no knowledge of the robbery. App. 822.

Testimony of Defense Counsel

Defense counsel recalled that police portrayed Petitioner's joke about Rabon being a good robbery target as an admission of guilt. App. 825. However, counsel testified that, "I'll be one-hundred percent honest with you. I don't think that she thought for a minute that [the robbery] was something that was seriously going to happen." App. 825, ll. 18-20.

Counsel identified Furniss as the "common thread" linking Petitioner to the robbery. App. 830, ll. 6-15. Counsel claimed that he did not call Furniss as a witness because she had

already pled guilty and he was concerned that her testimony was "going to go the other way, that it would hurt and not help." App. 826, ll. 13-19.

Counsel also recalled that Petitioner had an unpaid electric bill that he was afraid Furniss knew about and would claim that it was Petitioner's motive. App. 827. Oddly, given his concerns over the electric bill, defense counsel noted that he may have "opened the door" to evidence of the electric bill in his opening argument. *Id.* Ultimately, the State never mentioned the unpaid electric bill at trial. *Id.*

Defense counsel conceded that he never questioned why the State did not call Furniss, but attributed it to the effectiveness of his attack on her during opening arguments. App. 836. On reflection, counsel admitted that he perhaps should have attempted to learn why Furniss was not called and whether her prospective testimony had changed. *Id.* Finally, defense counsel stated that he was surprised by the verdict and believed that the jury "split the baby." App. 843.

Order of Dismissal

Judge Harrington denied Petitioner's application by an Order of Dismissal filed on November 3, 2014. App. 859 - 866. The PCR court ruled that defense counsel was not ineffective for failing to call Furniss during its case in chief as "Furniss would open the door to the introduction of the power bill." App. 864 - 865.

Curiously, given that counsel admitted to being surprised, when summarizing defense counsel's trial strategy the Order of Dismissal states that counsel "was not surprised by the testimony at trial." *Id.* The Order of Dismissal made no findings as to Furniss' credibility. *Id.* The court determined that Petitioner failed to show how Furniss' testimony would have aided her defense. *Id.*

ARGUMENT

Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated when defense counsel failed to subpoena a co-defendant, Paige Furniss, who would have testified that Petitioner was not involved in the plan to decoy and rob Donald Rabon and that Petitioner was unaware that her co-defendants had borrowed her car to effectuate the robbery and subsequent murder?

Defense counsel rendered ineffective assistance of counsel because his professed trial strategy was not objectively reasonable in light of his failure to call Paige Furniss as a witness, where Furniss would have testified that Petitioner was not involved in the robbery. Given that the jury submitted a note during deliberations requesting to rehear the testimony of five witnesses, including the three former co-defendants that testified against Petitioner, Furniss' testimony would have significantly undermined the self-serving, incredulous claims of the other co-defendants. App. 701; App. 827; *Strickland v. Washington,* 466 U.S. 668 (1984).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases; courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bulter*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625 (*citing Strickland*, 466 U.S. 668). 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." *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. In his opening statement, defense counsel asked the jury "[d]oes is make sense that [Petitioner] would set up Ronald Rabon to be murdered." Defense counsel also stressed that all of the former co-defendants had agreements to testify and that their credibility was highly suspect. App. 242 - 247.

At the PCR hearing, Furniss testified that, had she been called at trial, she would have explained that Petitioner was not involved in the robbery. App. 812 - 817. Furniss was the "common thread" linking Petitioner to those involved in the robbery. App. 830. Testimony from her refuting the State's theory would have carried significant weight with the jury. By his own admission, defense counsel's plan to have James testify to Petitioner's version of events "didn't come off as positive as I had hoped." App. 828, ll. 17-25.

Moreover, counsel candidly admitted that it never occurred to him to call Furniss as a witness once the State failed to call her during their case and he had no strategic reason for doing so. App. 826; *see Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (not objectively reasonable given the defense theory of the case for counsel not to call witnesses that were critical to the defense); s*ee also Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995).

Accordingly, the PCR court erred in finding that counsel's performance was not deficient because counsel was unable to demonstrate how his professed trial strategy was objectively reasonable "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064-2065; *Cherry*, 300 S.C. 115, 386 S.E.2d 624.

Prejudice

Petitioner was prejudiced by defense counsel's failure to call Paige Furniss for two reasons. First, when the State failed to call Furniss during their case in chief, Petitioner was deprived of crucial testimony removing her from the robbery conspiracy because of defense counsel's failure to subpoena Furniss. App. 797 - 801.

Second, the jury sent out a note during deliberations asking to rehear the testimony of five witnesses, including three co-defendants and the lead investigating officer. *See Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (counsel ineffective where victim was the sole witness and her identification of defendant as her attacker was crucial to the State's case, counsel failed to call emergency medical personnel who would have testified victim stated immediately after attack that she did not know her assailant).

The request to rehear essentially the entirety of the State's case reveals how uncertain jurors were of Petitioner's involvement. App. 701 - 710. Under these circumstances, Furniss' testimony would have very likely changed the outcome of the trial. App. 812 - 819; *see Bannister v. State,* 509 S.E.2d 807, 809 (S.C. 1998) ("PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony . . . in order to establish prejudice from the witness' failure to testify").

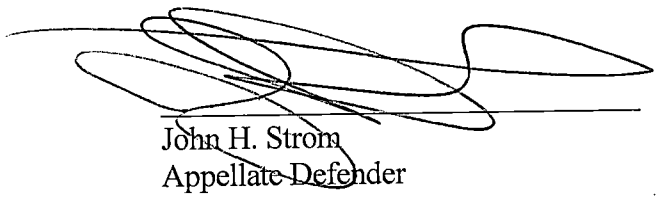
Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional

errors, the result of the proceeding would have been different." App. 859 - 866; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *see Strickland*, 466 U.S. 668.

CONCLUSION

For the foregoing reason, this Court should grant the petition with the ultimate relief of a new trial for Petitioner Crystal Turner.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire this 27th day of August, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of August, 2015.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.