ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

R. Keith Kelly, Circuit Court Judge

RISHAWN LAMAR REEDER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002708

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

In a case where the State presented only circumstantial evidence of guilt and petitioner received a jury instruction on self-defense, whether trial counsel's failure to object to a jury charge that malice may be inferred from the use of a deadly weapon constituted ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights?

2.

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to introduce video from the hospital showing petitioner with a time stamp that was inconsistent with the time stamp from the video the police alleged showed the cars involved in the shooting?

3.

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to investigate and call as a witness Glenn Kelly, who would have testified that the vehicle involved in the shooting was a Mustang, and not the Nissan linked to petitioner's co-defendant?

STATEMENT

On May 6, 2010, petitioner Rishawn Reeder ("Reeder") was indicted by a Spartanburg County grand jury for murder, assault and battery with intent to kill, and assault with intent to kill. App. 864-69. On May 9, 2011, Reeder was tried along with his co-defendant, Darius Cathcart ("Cathcart") before the Honorable Roger L. Couch and a jury. App. 1. Abel Gray and Prina Tailor represented the State. App. 1. Roger Poole represented Cathcart. App. 1. Michael Brown represented Reeder. App. 1. The jury convicted both Cathcart and Reeder. App. 466, l. 13 – 467, l. 19. Judge Couch sentenced Reeder to concurrent terms of ten years' imprisonment for assault with intent to kill, twenty years' imprisonment for assault and battery with intent to kill, and life imprisonment for murder. App. 485, ll. 1 – 6. Reeder's appeal was dismissed by the Court of Appeals for failure to timely order a transcript and failure to serve and file the Initial Brief of Appellant. App. 827.

On January 31, 2012, Reeder filed a PCR application. App. 487. On November 3, 2014, a hearing was held before the Honorable R. Keith Kelly. App. 569. J. Falkner Wilkes represented Reeder. App. 569. Suzanne H. White represented the State. App. 569. On December 9, 2014, Judge Kelly denied Reeder's application. App. 826. This petition follows.

ARGUMENT

1.

In a case where the State presented only circumstantial evidence of guilt and petitioner received a jury instruction on self-defense, trial counsel's failure to object to a jury charge that malice may be inferred from the use of a deadly weapon constituted ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights.

The Evidence Presented at Trial

The solicitor admitted that his case against Reeder was entirely circumstantial. App. 375, ll. 2 – 4. The State's theory was that Reeder's co-defendant Cathcart got into a fight with Bryant Miller ("Miller"), Dwight Geter ("Dwight"), and Dwight's brother, the decedent, at a club. App. 375, l. 1 – 376, l. 18. The State argued that Cathcart and Reeder lay in wait for the other men and opened fire. App. 375, l. 1 – 376, l. 18. No one identified either Cathcart or Reeder as the shooter. While the State's witnesses did identify Cathcart as an antagonist at the club, no witness ever placed Reeder at the club or having anything to do with the fight.

Miller was hanging out with Dwight, the decedent, and Marty Jackson ("Marty") on the night of the shooting at Club Dreams. App. 85, l. 22 – 86, l. 21. App. 195, ll. 15 – 16. They rode to the club in in a red "Crown Vic." App. 86, ll. 18 – 25. While at the club, Dwight, decedent, and Marty got into a fight with Cathcart and some other unidentified people. App. 87, ll. 1 – 15. Miller did not witness the fight and was allowed to give a hearsay version from his cousin over objection. App. 102, l. 1 – 109, l. 12. Dwight, decedent, and Marty were "put out" of the club for fighting. App. 87, ll. 22 – 25.

Miller testified that the group left the club and went to Waffle House where they "just sat in the parking lot." App. 88, ll. 1 – 21. The police arrived to patrol the Waffle House and the

group left because Miller had a gun. App. 123, ll. 16 – 22. Miller's gun was a .40 caliber Taurus. App. 116, ll. 2 – 8. The group went to Miller's house. App. 89, ll. 18 – 25.

They left Miller's house to take decedent home. App. 90, ll. 8 – 24. As they were leaving the neighborhood they stopped at a four-way stop sign. App. 91, ll. 2 – 4. A dark green Nissan with rims and tinted windows "pulled up behind us and started shooting." App. 91, ll. 2 – 10. Miller was in the back seat behind the driver. App. 91, ll. 19 – 21. The decedent was also in the back seat. App. 92, ll. 6 – 7. Miller did not see any headlights that were illuminated. App. 91, ll. 23 – 24.

The windows shattered and Miller knocked out the remaining glass. App. 98, ll. 10 – 13. Miller returned fire. App. 92, ll. 18 – 23. Miller was shot in the neck. App. 92, l. 24 – 93, l. 6. The decedent was also shot in the neck. App. 93, ll. 19 – 24. The other car pulled away after Miller started shooting. App. 93, ll. 12 – 18.

Instead of going straight to the hospital or calling 911, the men drove to the Geter home. App. 117, ll. 7 – 19. Miller claimed the purpose of first going to the Geter home was to "let Marty out." App. 117, ll. 20 – 21. Marty did not live at the Geter home. App. 117, ll. 24 – 25. Miller disposed of his gun on the way to the hospital and denied leaving it at the Geter home. App. 125, ll. 11 – 24. The group then drove to Mary Black Hospital where decedent was pronounced dead on arrival. App. 129, ll. 4 – 14. App. 94, ll. 3 – 7.

The security guard at Mary Black Hospital saw the group arrive in a red "Crown Vic." Appendix 132, ll. 11 – 22. The security guard gave a statement to police that he saw two men with the decedent, one wearing a black shirt who was the driver of the car, and Miller who was wearing "a reddish pink shirt." Appendix 134, l. 24 – 135, l. 19.

The police collected gunshot residue swabs from Cathcart and Reeder at Spartanburg Regional Medical Center. App. 259, ll. 2 – 9. The police also took gunshot residue swabs from Michael Crossley. App. 259, ll. 10 – 14. SLED's gunshot residue expert testified that the swabs were positive for Reeder and Cathcart and negative for Crossley. App. 326, ll. 10 – 24. On cross-examination, the expert admitted that a person who is shot will likely have gunshot residue on their hands "even if they have never fired a gun." App. 346, l. 8 – 347, l. 13. Reeder had a gunshot wound to his left arm. App. 390, ll. 11 – 18. SLED also collected gunshot residue swabs from Dwight, Miller, and the decedent. App. 340, l. 19 – 341, l. 17. All three tested positive for gunshot residue. App. 340, l. 19 – 341, l. 17. SLED's firearm expert testified that, from his analysis of shell casings collected by the police, at least two and possibly three guns were involved. App. 362, l. 3 – 363, l. 16.

Cathcart had a graze wound under his arm. App. 278, ll. 10 – 17. A police officer questioned Cathcart at the hospital. App. 154, l. 11 – 157, l. 9. Cathcart told the police he was at the Dreams night club with Reeder "and a guy named Black." App. 154, ll. 15 – 20. Cathcart was driving a Nissan. App. 154, ll. 15 – 20. Cathcart claimed he did not remember much about the shooting, could not give a description of the other vehicle, and drove himself and Reeder to the hospital. App. 154, l. 15 – 155, l. 2. During a later interrogation at the sheriff's office, Cathcart told the police he was driving a grey Nissan with Reeder, left the club and went to Waffle House, then to a gas station. App. 159, ll. 16 – 160, l. 6. A car came beside them and opened fire. App. 160, ll. 1 – 6.

The police introduced surveillance video from a business called Southeastern Converters. App. 299, l. 4 – 302, l. 10. During his closing argument, the solicitor told the jury "And thank God for this video surveillance camera. Otherwise we wouldn't even be here." App. 427, ll. 16

– 20. The solicitor claimed the video showed the cars and that the lights of the second car were not illuminated. App. 424, l. 18 – 425, l. 6.

The Trial Court's Charge to the Jury and the PCR Court's Holding

Based on Cathcart's statement to police that the other car shot first, the trial judge charged self-defense. App 452, l. 24 – 456, l. 9. App. 395, l. 2 – 401, l. 12. The court told counsel that he would charge self-defense before closing arguments. App. 401, ll. 6 – 12. When the court defined malice, it charged the jury that "Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may arise when a deed is done by a person using a deadly weapon." App. 450, ll. 9 – 11. Trial counsel did not object. App. 458, ll. 6 – 12.

At the PCR hearing, trial counsel tried to explain why he did not object by stating that he did not "find that malice in itself would be inconsistent with self-defense, if you're looking at the notion of malice itself being a wrongful act, and its intentionally trying to—to cause conflict—I mean, inflict injury to someone." App. 586, l. 18 – 587, l. 18. The PCR court found that counsel was not deficient in failing to object to the charge on inferred malice because there was no evidence in the record to "reduce, mitigate, excuse, or justify the homicide." App. 834-36 (internal quotations omitted).

Discussion

The PCR court erred in denying Reeder's application because trial counsel's failure to object under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) constituted deficient performance that prejudiced Reeder. See Strickland v. Washington, 466 U.S. 668 (1984). Belcher held that instructing the jury that malice may be inferred from use of a deadly weapon is error "where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Id. at 600, 685 S.E.2d at 803-04. In Belcher, the jury was instructed that "malice may be inferred by the

use of a deadly weapon." Id. at 601, 685 S.E.2d at 804. This court held that the evidence in Belcher "presented a jury question on self-defense." Id. at 601, 685 S.E.2d at 804.

Reeder's case is no different than Belcher. Reeder received a self-defense charge, just like Belcher. Just as in Belcher, Reeder's jury was instructed that "Inferred malice may arise when a deed is done by a person using a deadly weapon." App. 450, ll. 9 – 11. Belcher was decided in 2009 and petitioner's trial was two years later, in 2011. Trial counsel's failure to object was deficient and prejudiced Reeder. The evidence in this case was wholly circumstantial and especially weak as related to Reeder. Reeder was shot in the arm and the purported victims admitted shooting and all tested positive for gunshot residue. This Court should grant certiorari and reverse Reeder's convictions.

2.

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to introduce video from the hospital showing petitioner with a time stamp that was inconsistent with the time stamp from the video the police alleged showed the cars involved in the shooting.

At the PCR hearing, petitioner introduced surveillance videos taken at Spartanburg Regional Medical Center. App. Ex. 1. The videos show petitioner entering the hospital at 3:55 AM. App. Ex. 1. The video from Southeastern Converters without which the solicitor said, "we wouldn't even be here," showed a time stamp from 3:47 AM to 3:54 AM. App. Ex. 1. App. 580, ll. 14 – 20. App. 427, ll. 16 – 20. Trial counsel admitted that if the time stamps were correct, it would show the State was trying to put petitioner in two places at the same time. App. 581, l. 23 – 582, l. 9.

The PCR court credited trial counsel with a strategic reason for not using this video. App. 830-31. The court noted trial counsel's testimony that the differing times could "easily be explained away if the State had brought in anyone to discuss the videos." App. 831. Trial counsel also explained that he did not want the jury to see petitioner walking into the hospital with Cathcart. App. 831.

The PCR court's ruling ignores the fact that the State offered no evidence to rebut the time stamps on the videos. Trial counsel offered no testimony that he investigated the time stamps and found them to be inaccurate. The failure to conduct a full and independent investigation constitutes deficient performance under the Sixth Amendment. Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). Counsel merely speculated about the time stamps and did not make any investigation into the matter. This failure prejudiced petitioner. Had the jury seen evidence that the video on which the State placed such great emphasis was taken at the same time petitioner was at the hospital, this fact alone would have created reasonable doubt in this entirely circumstantial case.

Trial counsel's "strategy" is inconsistent with his actions at trial because he was aware that Cathcart would testify that he was at the hospital with petitioner. The video in this case is akin to the alibi witness in Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014), in which trial counsel was held ineffective. In Walker, the attorney failed to interview or contact the defendant's alibi witness. Walker at 403-04, 756 S.E.2d at 146. The witness would have testified that the defendant spent every weekend with her during the time period when the rape occurred. Id. The Court held that one component of an attorney's 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. at 405, 756 S.E.2d at 147. In this case, the hospital video was the alibi witness. Trial counsel failed to investigate and present crucial exculpatory evidence. This Court should grant certiorari and reverse petitioner's convictions.

3.

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to investigate and call as a witness Glenn Kelly, who would have testified that the vehicle involved in the shooting was a Mustang, and not the Nissan linked to petitioner's co-defendant.

Petitioner called Glenn Kelly ("Kelly") as a witness at the PCR hearing. Kelly called 911 after witnessing the shooting. App. 658, l. 7 – 659, l. 17. Kelly testified that he saw a green Mustang pull up behind the Crown Victoria and start shooting. App. 658, ll. 15 – 19. Kelly testified that he was "pretty good with cars. I mean, if I said it was a green Mustang, it was a green Mustang." App. 660, ll. 1 – 2.

Petitioner also introduced a field interview card that was produced by the State in discovery that corroborated Kelly's testimony. App. 614, l. 15 – 617, l. 7. The interview notes state: "3:45 heard shots at cross road 4 way stop / saw Mustang & Crown Vic." App. 773-74. Trial counsel admitted that he heard "about a Mustang being in the area." App. 615, ll. 19 – 21. Trial counsel never spoke with Kelly. App. 616, ll. 19 – 20. In conclusory fashion, the PCR court held that counsel was not deficient because he "prepared extensively for Applicant's trial" and that Reeder "failed to show how that any additional investigation into this witness would have affected the outcome of the trial." App. 840-41. The PCR court did **not** make an adverse credibility finding concerning Kelly. App. 840-41.

The PCR court erred because no evidence shows that trial counsel conducted any investigation related to Kelly and Kelly's testimony at the PCR hearing demonstrated prejudice.

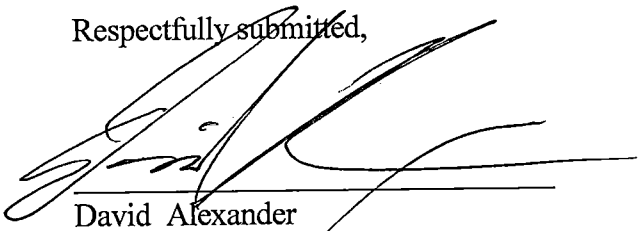
See Wiggins v. Smith, 539 U.S. 510, 521-22 (2003); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). Kelly's testimony about a Mustang would have contradicted Miller's testimony about the Nissan involved in the shooting. The State successfully linked the Nissan to Cathcart, and, as demonstrated above, Cathcart was the only link between petitioner and the shooting. Had the jury heard Kelly—an unbiased witness—describe a Mustang instead of a Nissan, it would have severed this link. Kelly's testimony undermines confidence in the outcome of this trial.

This Court has recognized the importance of trial counsel investigating and locating favorable fact witnesses. In Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 113-14 (1991), this court held trial counsel ineffective for failing to subpoena a witness who could have testified favorably for the defense. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case. Kelly's testimony was not only favorable—it would have contradicted the State's entire theory of the case. Trial counsel's failure to even speak with Kelly or call him as a witness violated petitioner's Sixth Amendment right to the effective assistance of counsel. This Court should grant certiorari and reverse petitioner's convictions.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2015.

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RISHAWN LAMAR REEDER,

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RESPONDENT

APPELLATE CASE NO. 2014-002708

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 Alicia Olive, Esquire, at the Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, via U.S. First Class Mail with the appropriate postage affixed thereto, and Mr. Rishawn Lamar Reeder #316370, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of September, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of September, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 3, 2022.