

STATE OF SOUTH CAROLINA
In The Supreme Court

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Appeal from Georgetown County
Court of Common Pleas

S.C. Supreme Court

The Honorable Benjamin H. Culbertson, Trial Judge
The Honorable Kristi Lea Harrington, Post-Conviction Relief Judge

Appellate Case No. 2015-000017

Donovan Raheam Pringle, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

- I. Whether probative evidence supports the PCR Court's finding that trial counsel performed effectively even though he did not present alibi witnesses.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In July 2009, the Georgetown County Grand Jury indicted Petitioner for armed robbery (2009-GS-22-836) and possession of a weapon during the commission of a violent crime (2009-GS-22-837). C. Reuben Goude, Esquire ("trial counsel"), represented Petitioner. On December 14, 2009, Petitioner proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. On December 15, 2009, the jury found Petitioner guilty as indicted. Judge Culbertson sentenced Petitioner to concurrent terms of twenty (20) years for armed robbery and five (5) years for possession of a weapon during the commission of a violent crime.

Petitioner filed a timely notice of appeal, and Elizabeth A. Franklin-Best, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on May 16, 2012. State v. Pringle, Op. No. 2012-UP-303 (S.C. Ct. App. filed May 16, 2012). The remittitur was returned to the circuit court on June 5, 2012.

Petitioner filed an application for post-conviction relief (PCR) on July 10, 2012 (2012-CP-22-726). (App.pp.214-249.) Respondent filed a return on or about October 5, 2012. (App.pp. 250-253). A hearing was held at the Darlington County Courthouse on August 28, 2014. (App.pp.255-343.) Petitioner was present and represented by Tristan Shaffer, Esquire. Joshua Thomas, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Kristi Lea Harrington denied relief in an order dated September 8, 2014 and filed October 8, 2014, and filed October 20, 2014.

(App.pp.345-352). Petitioner filed a motion to alter or amend and motion to reconsider on October 31, 2014. (App.pp.354-357.) Judge Harrington denied this motion via a Form 4 order signed on November 4, 2014, and filed on November 13, 2014. (App.pp.358-359.) A notice of appeal was filed at this Court on January 6, 2015. Susan B. Hackett, Esquire represents Petitioner.

This return to the petition for writ of certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s 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. Strickland, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner 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 petitioner 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.

ARGUMENT

I. Whether probative evidence supports the PCR Court's finding that trial counsel performed effectively even though he did not present alibi witnesses.

Petitioner argues that the PCR Court erred when it did not find trial counsel ineffective for failing to call alibi witnesses. Petitioner separates this argument into two (2) parts, specifically 1) failure to introduce alibi witnesses and 2) failure to conduct a pre-trial investigation. Respondent argues that these issues are one and the same as they both concern preparation and presentation of the alibi witnesses in terms of trial counsel's effectiveness. Regardless, Petitioner's argument is meritless as ample evidence supports the PCR Court's finding that trial counsel was not ineffective.

Respondent will first consider the matter of investigation. The manner in which Petitioner frames the issue of investigation in the petition for writ of certiorari is that of a total failure by trial counsel to investigate, though this is simply not the case. In a busy criminal defense practice, it is not uncommon for attorneys to have their staff do a great deal of legwork. Here, trial counsel and his office staff met with the potential witnesses

and received written statements from them. (App.pp. 317:21-318:4; 334:12-25.) There is no suggestion that trial counsel's office failed to contact any potential witnesses; rather, the argument is that he did not investigate well enough.

Trial counsel obviously reviewed these statements, as is evident by his handwriting on them and his testimony about them. (App.pp.272:7-274:16.) His testimony revealed that he did not feel that none of the witnesses would bolster his client's case, and that Petitioner's mother may also be viewed as not being trustworthy due to having a criminal record. (App.pp.281:9-283:2.) At the PCR hearing, PCR counsel called two (2) of these witnesses and asked what they would have testified to at trial. Just as trial counsel had found, neither could say that they saw Petitioner in the house between 4:00 and 5:00 a.m. when the robbery was allegedly occurring. Petitioner's mother stated that her trailer has thin walls, and her dogs bark loudly when people come and go. (App.pp.308:20-309:3.) Petitioner's sister said that she let him into the house around 1:30 a.m. and saw him playing video games. (App.p.322:5-10.) Trial counsel had this information beforehand, along with more information, such as that Petitioner's sister was nervous and confused about times. (App.p.272:17-23.) As cited by the dissent in Walker v. State, "since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." 21 Am.Jur.2d, Criminal Law, s 136, (cited by State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980)). The totality of this evidence is enough to justify trial counsel's strategic decision not to call these witnesses.

Respondent does not dispute Petitioner's framing of the case law on page 22 of

the petition. Respondent does, however, dispute Petitioner's application of the facts. In this situation, the witnesses were identified, contacted, and their testimony was evaluated. See Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014).. Trial counsel fulfilled his duty to make reasonable investigations into witnesses. Id. Witnesses were interviewed by his staff and trial counsel did not rely on the statements of the Petitioner. At the PCR level, his decision was "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). After this assessment, the PCR court found that his actions were reasonable and justifiable, and that Petitioner had failed to carry his burden. (App.p.352.) It was only at this time that a court had the opportunity to judge the credibility of these witnesses.

Based on all of this, trial counsel made a reasonable decision not to call these witnesses. Trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. As stated in the PCR order of dismissal,

"Applicant's sister's testimony clearly does not establish an alibi. She testified she saw Applicant at 1:30 AM, and again the next morning, but could not account for his whereabouts in the interim. Because she could not testify to Applicant's whereabouts immediately prior to 4:50 AM, Applicant's sister does not provide an alibi for Applicant. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (witness' testimony regarding applicant's whereabouts hours before crime does not create an alibi)." (App.p.351.)

The same can be said of mother's testimony: "Taking this testimony as a whole, the Court concludes Applicant's mother did not see Applicant after 4:00 AM. Furthermore, her testimony that she would have known if he left the house is mere speculation. ...[T]he Court finds Applicant has not demonstrated a reasonable probability his mother's

testimony would have changed the result at his trial.” (App.p.352.) When asked to review its findings in the motion for reconsideration, the PCR court declined to change its decision. (App.pp.358-9.)

These arguments all return to the two-prong test of Strickland v. Washington and the procedural guidance of Cherry v. State. It simply cannot be said that “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, 466 U.S. at 686, 104 S.Ct. at 2064. Under the first prong of Strickland, 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. Certainly, trial counsel was reasonable in reaching out to all witnesses identified, gathering statements, reviewing these statements, and weighing the potential benefit of producing these statements through testimony at trial. Secondly, counsel’s deficient performance must have prejudiced the petitioner 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. This burden has not been overcome. The PCR court did not find that the content and credibility of the witnesses’ statements was enough to reach the level of a reasonable probability, and there is no further argument or evidence provided to allow this court to reach a different conclusion.

Petitioner cited the matter of Stokes v. State, which is precisely on point, as trial counsel weighed the value of testimony and decided it would not be of value, including listening to Petitioner’s wishes. 308 S.C. 546, 419 S.E.2d 778 (1992). (see App.p. 273:14-16, “And like I got through telling you, my client and the mama told me not to use

Shavon and the sister, Carlette, too.”) “If there is any probative evidence in the record to support the PCR judge's decision, his ruling must be affirmed. Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Id. 308 S.C. at 548, 419 S.E.2d at 779. Trial counsel made a strategic decision that the potential alibi testimony simply was not strong enough to help Petitioner’s case. Furthermore, by not presenting a case, Petitioner gained an advantageous position in closing arguments.

Ultimately, the decision to call alibi witnesses and use their testimony is in the discretion of the defendant and trial counsel. In this circumstance, the matter was discussed, and the decision reasonable decision was made not to call these witnesses. Because of the witnesses’ unreliable stories, none of which could firmly place Petitioner in the home during the time of the robbery, and a lack of evidence on the part of the solicitor, trial counsel and Petitioner made a logical decision in not calling these people.

Conclusion and signature follow.

CONCLUSION

For the reasons stated above, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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December 11, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

The Honorable Benjamin H. Culbertson, Circuit Court Judge

DONOVAN R. PRINGLE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
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This 11th day of December, 2015.


NORMA BIGBEE
LEGAL ASSISTANT