

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000369

RECEIVED

MAR 11 2016

SC SUPREME COURT

Antonio R. Trimmier, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Did trial counsel's failure to investigate, marshal, and present evidence of Petitioner's alibi – the fact that he was on house arrest at the time of the robbery – result in ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution?
2. Did trial counsel's failure to investigate, marshal, and present evidence to impeach the testifying co-defendants result in ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the September 2008 term of General Sessions for armed robbery (2008-GS-23-2523, count 1) and possession of a weapon during commission of a violent crime (2008-GS-23-2523, count 2). (App.pp.327-28). Amanda Lackland Wicker, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On October 6, 2009, the Honorable John C. Few sentenced Petitioner to concurrent terms of 22 years for armed robbery and 5 years for possession of a weapon during commission of a violent crime. (App.p.188; pp.329-30).

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders¹ brief. (App.pp.190-205). The Court of Appeals dismissed the appeal. State v. Trimmier, Op. No. 2012-UP-070 (S.C. Ct. App. filed Feb. 8, 2012). (App.pp.210-11).

Petitioner filed an application for post-conviction relief (PCR) on March 7, 2013 (2013-CP-23-1326). (App.pp.212-18). A hearing was held at the Greenville County Courthouse on October 22, 2014 before the Honorable Letitia H. Verdin. (App.pp.224-66). Petitioner was present and represented by Richard H. Warder, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. After the conclusion of the hearing, Petitioner filed a "Motion to Amend the Record and Include Exhibits Which Supports Applicant's Testimony" on November 12,

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

2014. (App.pp.270-85). Judge Verdin granted the motion and allowed the Respondent to file a return, which was submitted on November 19, 2014. (App.pp.286-89). Petitioner filed “Applicant’s Amended Motion to Amend the Record and Include Exhibits Which Supports Applicant’s Testimony” on December 9, 2014. (App.pp.290-318). Judge Verdin denied post-conviction relief in an order of dismissal filed February 2, 2015. (App.pp.319-26).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have presented an alibi defense.

Petitioner argues the PCR judge’s finding that Petitioner failed to meet his burden of proving trial counsel erred in not investigating and presenting evidence of his alibi – that he was allegedly on house arrest at the time of the crime – is not supported by the record. This argument is without merit.

At the PCR hearing, Petitioner stated he had pending charges at the time of trial and that trial counsel stated this – along with testimony about the possibility of gang involvement – could make him “look bad” if he testified. (App.pp.244-45). Petitioner

stated he told trial counsel at his first meeting that he was on house arrest at the time of the crime. (App.p.257). Petitioner stated trial counsel said she “was going to look into it” but admitted trial counsel never said she would argue this as an alibi defense at trial. (App.pp.257-58).

Petitioner’s mother stated Petitioner was on house arrest at the time of the crime. Petitioner’s mother stated she could not remember the particular night but that Petitioner was always at home when she needed him. (App.pp.261-63).

Trial counsel testified she received this case one month before trial but that she had adequate time to prepare. (App.p.228; p.237). Trial counsel testified she and Petitioner would have discussed his prior record. (App.p.231). Trial counsel testified there were no notes in her file that Petitioner was on house arrest. (App.p.237). Trial counsel testified that, if Petitioner had said he was on house arrest at the time of the crime, she would have followed up on this. (App.pp.236-37). Trial counsel testified she made a pre-trial motion to limit gang testimony and that she decided “that if a jury heard that it was a gang activity, that would be more comparable to [Petitioner’s] case.” (App.pp.230-31).

In denying Petitioner’s application for post-conviction relief, the PCR judge found trial counsel articulated a valid strategic decision that she did not pursue the house arrest alibi theory at trial. (App.p.323). The PCR judge found trial counsel’s determinations in this regard were entitled to “strong deference.” (App.p.323).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance

under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have argued an alibi defense at trial. In order to argue an alibi based on Petitioner's purported house arrest at the time of the crime, trial counsel would have had to elicit testimony that Petitioner had pending criminal charges at the time of the crime. This would have likely also opened the door to testimony that Petitioner's pending charges at the time were gang-related. Trial counsel made a reasonable and appropriate decision not to embark on this course. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case."). Trial counsel was also not deficient in choosing not to present the purported alibi testimony of Petitioner's mother. As demonstrated at the PCR hearing, Petitioner's mother could not recall the day of the crime – she simply provided general testimony that Petitioner was "always there when [she] needed him" –

and thus would not have been a viable alibi witness. As such, trial counsel's decision not to call Petitioner's mother as a witness cannot be deemed deficient. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that trial counsel's failure to present a purported alibi witness was not ineffective when that witness's testimony was insufficient to establish an alibi defense); see also State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) (holding that since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the defendant's guilt, a purported alibi which leaves it possible for the defendant to be the guilty person is no alibi at all). The record clearly supports the PCR judge's conclusion that trial counsel articulated a valid trial strategy. See Wood v. Allen, 558 U.S. 290, 301-02, 130 S. Ct. 841, 849-50 (2010) (holding the record can be read to support a judge's factual determination of counsel's trial strategy).

Regardless, Petitioner also failed to meet his burden of proving the lack of an alibi defense – centered on his purported house arrest – prejudiced the outcome of the trial. Petitioner failed to meet this burden because he did not present any credible evidence or testimony that he was, in fact, on house arrest at the time of the crime. Petitioner also failed to present any credible evidence or testimony that records from the house arrest program² to corroborate his contention that he was home on the night in question and could not have been involved in the armed robbery. Without such, Petitioner cannot demonstrate prejudice. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR

² Referred to as the Home Incarceration Program, or HIP, in the PCR judge's order of dismissal.

hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense). Petitioner cannot demonstrate the outcome of his trial would have been different if trial counsel had pursued an alibi defense. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have impeached the testifying co-defendants.

Petitioner argues the PCR judge erred in finding Petitioner did not meet his burden of proving trial counsel should have questioned the testifying co-defendants about their pending charges. This argument is without merit.

At the PCR hearing, Petitioner stated trial counsel failed to “investigate and discover the backgrounds” of two of the testifying co-defendants. Petitioner stated Marteze Hardy and Keith Williams had criminal charges. (App.p.249). Petitioner also stated the three testifying co-defendants were members of the Bloods and he was a member of the Crips. Petitioner stated this should have been explored at trial to show

these witnesses had a motive to lie. (App.pp.240-41). Petitioner stated he believed the outcome of his trial would have been different if the jury knew he was in a gang that was a rival to the co-defendants' gang. (App.pp.258-59).

Trial counsel testified the trial strategy was to show the co-defendants' bias, as they were offered plea bargains in exchange for their testimony against Petitioner. (App.p.230; p.233). Trial counsel testified she made the decision regarding testimony about the co-defendants' gang affiliation "that if a jury heard that it was a gang activity, that would be more comparable to [Petitioner's] case." (App.p.231). Trial counsel testified she believed they could "poke enough holes in the State's case and just limit it to just cross-examination just as a strategic decision." (App.p.233; p.236).

In denying Petitioner's application for post-conviction relief, the PCR judge noted trial counsel's testimony that she believed cross-examination would be sufficient to attack the State's witnesses. (App.p.324). The PCR judge found trial counsel had adequate time to prepare for trial and "no evidence presented by [Petitioner] which demonstrates any ineffective assistance of trial counsel." (App.p.324).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have investigated the backgrounds of the testifying co-defendants. At the PCR hearing, Petitioner was adamant that trial counsel should have questioned the co-defendants about their gang affiliations in order to show they had motive to testify against him. It is clear trial counsel made a strategic decision not to pursue the issue of the co-defendants' pending charges – and thus their gang affiliations – during trial, as that would have also brought up the issue of Petitioner's own gang

affiliation, which could have only served to harm Petitioner's case. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841 (2010). Rather, trial counsel wisely decided to attack the testifying co-defendants by arguing they were biased in favor of the State because of the beneficial plea agreements they had received. Trial counsel asked each of these witnesses about the reduced charge and sentence they were now facing. (App.pp.89-90; pp.109-10; pp.125-26). Trial counsel also emphasized these inherent biases in her closing argument. (App.pp.172-73). As trial counsel articulated and then executed a valid trial strategy, such conduct cannot be deemed ineffective merely because the jury ultimately found Petitioner was guilty. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)) ("Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'").

Regardless, Petitioner also failed to meet his burden of proving the lack of further investigation into the testifying co-defendants prejudiced the outcome of the trial. Petitioner failed to present any credible evidence or testimony that two of these co-defendants (Hardy and Williams), in fact, had prior criminal convictions. See Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to

prove prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the PCR hearing that the victims and witnesses had criminal records). While Petitioner presents what are purported to be RAP sheets as exhibits in the Applicant's Amended Motion to Amend the Record and Include Exhibits Which Supports Applicant's Testimony," these documents merely indicate Hardy and Williams had been previously arrested, not that they had been convicted. (App.p.296; p.298). It is axiomatic that trial counsel could not have impeached Hardy and Williams with these arrests, however, as this is not permitted because they were not convictions. See Rule 609, SCRE. Further, while Petitioner argues these arrests were pending charges associated with this crime – and thus could be used to impeach the testifying co-defendants – he has not presented credible evidence or testimony to corroborate this. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814. As such, Petitioner cannot demonstrate the outcome of his trial would have been different if trial counsel had further investigated the testifying co-defendants. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 11th day of March, 2016.


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