

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED

AUG 10 2016

SC SUPREME COURT

JOHNNIE FRAZIER

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000387

PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX.....	i
ISSUE PRESENTED.....	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	10
CONCLUSION.....	13

ISSUE PRESENTED

Whether the PCR court erred by finding trial counsel provided effective representation where counsel failed to request an alibi jury instruction where counsel introduced evidence that Petitioner was with other people several miles away during the time frame of Carol Hursey's death, and there were no eyewitnesses or forensic evidence directly placing Petitioner at the crime scene?

STATEMENT OF THE CASE

Sidney Hursey left his Lexington County home at around 6:00 a.m. on August 14, 2003, to go to work. App. 52, ll. 21 – 25. He called his wife, Carol Hursey, from work at around 10:00 a.m. but did not get an answer. App. 60, ll. 18 – 23. When Hursey could not reach his wife, he called his sister-in-law, Tina Davis, around 11:00 a.m. to go check on her. App. 61, ll. 2 – 11. Davis went to Hursey's home, but Carol Hursey's car was not there. App. 61, ll. 10 – 12.

Hursey continued calling his wife on her cell phone, but she did not answer. App. 53, ll. 11 – 25. Hursey left work a little before 2:00 p.m. and drove back home. App. 54, ll. 3 – 23. Hursey returned home around 2:30 p.m. and found his wife in the back bedroom lying dead on the floor from a gunshot wound to her head. App. 55, l. 17 – App. 56, l. 7. Hursey also discovered \$5,000.00 missing from the brief case where he and Carol Hursey kept the money from their auction business. App. 56, l. 22 – App. 57, l. 10. Carol Hursey's 2002 maroon Mazda was missing from the home as well. App. 57, ll. 13 – 25. Hursey called the police. App. 58, ll. 10 – 12.

The coroner estimated Carol Hursey's time of death to be around 8:00 a.m. on August 14, 2003. App. 446, ll. 1 – 17. The forensic pathologist, however, could not determine an exact time of death. The pathologist asserted that the time of death could have been "early a.m. to early p.m." App. 141, ll. 10 – 25.

Police Investigation

Hursey gave police the names of several individuals, including Petitioner, who knew his wife and could have been involved in her death. App. 58, ll. 13 – 17. Hursey and his wife ran an auction business and owned multiple rental properties in the area. App. 44, l. 1 – App. 45, l. 22. Petitioner worked for the Hurseys doing home repairs. App. 48, ll. 16 – 21. Petitioner also

rented a home from the Hurseys. App. 49, ll. 3 – 5. According to Hursey, Petitioner knew that the money received from the auction was kept inside a brief case in their home. App. 50, ll. 8 – 10. About two weeks prior to her death, Carol Hursey had told Petitioner that he would be evicted because he stopped working and paying rent. App. 49, ll. 12 – 23.

On the evening of Carol Hursey's death, police located Ashley Starr Cougar, Petitioner's girlfriend. App. 151, ll. 7 – 10. Cougar told police that she was living with Petitioner when Carol Hursey told Petitioner that he would be evicted. App. 182, l. 12 – App. 183, l. 19. Cougar claimed Petitioner was upset and thought the Hurseys wanted him to work too much for the money they offered to pay. App. 182, l. 12 – App. 183, l. 19. Cougar added that Petitioner knew the money received from the auction business was kept inside the house. App. 184, ll. 8 – 16.

Cougar's son, Scottie Carson, also spoke with police. App. 151, ll. 17 – 23. Carson told police that he started living with Cougar and Petitioner about a week before Carol Hursey's death. App. 193, ll. 18 – 24. Carson claimed Petitioner asked him to find a "clean" gun. App. 195, l. 4 – App. 196, l. 12. Petitioner also allegedly told Carson that Carol Hursey had a lot of money in the house. App. 195, l. 4 – App. 196, l. 12. Police did not locate Petitioner that evening to speak with him. Flyers with Petitioner's picture were put up around the area on August 15, 2003, the next day. App. 238, ll. 4 – 11.

Four days after Carol Hursey's death, Sherri Quarles, a neighbor of the Hurseys, told police that she had seen Petitioner driving Carol Hursey's car out of Hursey's driveway on the day of her death. App. 213, l. 22 – App. 214, l. 5. However, Quarles lied about the time frame. App. 218, ll. 2 – 6. Quarles initially told police she saw Petitioner driving Carol Hursey's car around 2:30 p.m. App. 216, ll. 8 – 10. When police returned to Quarles home in November, several months later, she changed the time to 10:00 a.m. App. 217, l. 22 – App. 218, l. 3.

According to Quarles, she lied to police to protect her then eight-year old daughter. App. 220, ll. 11 – 18. At trial, Quarles changed the time that she claimed to have seen Petitioner driving Carol Hursey's car back to 2:30 p.m. App. 220, ll. 11 – 18.¹

Tammi Inabinet and Matt Richburg, who smoked crack with Petitioner, also spoke with police after Carol Hursey's death. App. 234, ll. 13 – 25. On the afternoon of August 14, 2003, the day of Carol Hursey's death, Inabinet drove her work van to Elbert Bolton's house. Bolton sold drugs from his house and Inabinet would go to the house to buy drugs. App. 296, ll. 12 – 25. Richburg rode with her. App. 297, ll. 6 – 12. She and Richburg stayed at Bolton's residence overnight smoking crack cocaine. App. 297, ll. 21 – 24.

Around 10:00 a.m. the next day, August 15, 2003, Inabinet, Richburg, and Petitioner left together in the work van. App. 298, l. 21 – App. 299, l. 6. Inabinet observed Petitioner with the black book bag. App. 300, ll. 7 – 10. The three abandoned the work van in front of Inabinet's ex mother-in-law's house and got into Richburg's car. App. 300, ll. 1 – 14. Petitioner realized that he left his black book bag in the work van. App. 303, l. 20 – App. 304, l. 5. However, Richburg did not return to the van to retrieve the bag. App. 303, l. 20 – App. 304, l. 5.

On August 18, 2003, police executed a search warrant on Inabinet's work van and discovered the black book bag. App. 334, l. 18 – App. 335, l. 1. A small amount of blood, which was later matched to Carol Hursey, was found on the outside of the bag. App. 392, ll. 9 – 10. A cigarette butt, which matched Petitioner's DNA, was located inside the bag. App. 391, ll. 11 – 16. A wallet containing Petitioner's identification card and a rubber glove was inside the

¹ Although it is difficult to understand why Quarles lied and changed the time, she told police she was worried about her daughter because someone had broken into her home the night after Carol Hursey's death. App. 217, l. 2 – App. l. 25.

bag as well. App. 336, l. 16 – App. 337, l. 24. No blood was found on the rubber glove. App. 381, ll. 8 – 10.

On August 23, 2003, about a week after Carol Hursey’s death, a witness reported that a burned car had been left in the woods near Swansea in Lexington County. App. 227, ll. 1 – 16. The car was later determined to be Hursey’s. The area was close to Petitioner’s father’s house. App. 237, ll. 5 – 18; App. 238, l. 20 – App. 239, l. 7.

Petitioner was charged with Carol Hursey’s death on January 10, 2004. App. 343, l. 19 – App. 344, l. 6. On March 2006, Petitioner was indicted by the Lexington County Grand Jury for murder, first-degree burglary, armed robbery, and possession of a weapon during commission of a violent crime. App. 673 – 678. Petitioner’s case proceeded to a jury trial before the Honorable James W. Johnson, Jr. on March 31, 2008. App. 1. Wayne Floyd represented Petitioner. David Stumbo and Dayton Riddle represented the State. App. 1.

Trial

At trial, defense counsel put up several alibi witnesses. Dorothy Drawdy, Petitioner’s sister, stated that Petitioner rode his bicycle to her home at 6:45 a.m. on August 14, 2003, the day of Hursey’s death. App. 481, ll. 3 – 14. Drawdy and her husband James lived about “8 to 10” miles from Elbert Bolton’s home where Petitioner had smoked crack the night before. App. 169, l. 14 – App. 170, l. 1; App. 481, ll. 7 – 14; App. 463, ll. 2 – 4. Petitioner and James left the house at 7:00 a.m. to go to work. App. 482, ll. 3 – 7. However, the two got into an argument on the way to work because Petitioner arrived late. App. 485, ll. 13 – 20. Petitioner got out of the truck and walked. App. 482, ll. 11 – 12.

Terry Bolton saw Petitioner walking down the road that same morning. Bolton picked up Petitioner between 8:30 a.m. and 10:00 a.m. the morning of Carol Hursey’s death. App. 464,

ll. 2 – 15. Bolton gave Petitioner a ride back to Elbert Bolton’s house, where they remained until 3:00 p.m. or 4:00 p.m. that afternoon. App. 464, l. 19 – App. 465, l. 14. Terry Bolton then took Petitioner to Petitioner’s father’s house. App. 465, ll. 3 – 14. Elbert Bolton corroborated Terry Bolton’s testimony. App. 454, ll. 1 – 22. Elbert Bolton lived about “nine and a half, ten and a half miles” from the Hurseys. App. 169, ll. 5 – 7.

Mary Francis Cooper, Sidney Hursey’s ex-wife, went to Hursey’s home around 7:00 a.m. the morning Carol Hursey’s body was found. App. 441, ll. 19 – 23. Cooper brought over a football for her son, who lived with Sidney and Carol Hursey. App. 441, l. 25 – App. 442, l. 2. Cooper did not go inside the home. Instead, she threw her son’s football across the Hursey’s fence so that her son could pick it up after school. App. 441, l. 25 – App. 442, l. 2. Cooper observed Carol Hursey’s car in the drive way at 7:00 a.m. App. 442, ll. 9 – 10.

Mark Mayers stated he was familiar with the Hurseys and their auction. App. 442, ll. 20 – 22. On the day of Carol Hursey’s death, Mayers was headed to traffic court and drove by the Hursey residence around 10:30 a.m. App. 443, ll. 1 – 5. Mayers observed Hursey’s car in the driveway when he drove past the home at 10:30 a.m. App. 443, ll. 6 – 14.

During closing argument, defense counsel argued that the lack of forensic evidence tying Petitioner to the scene and the timeline of Petitioner’s movement on the day of Carol Hursey’s death was reasonable doubt. App. 504, l. 13 – App. 505, l. 25. Counsel argued that none of the State’s evidence proved Petitioner murdered Hursey. App. 509, ll. 8 – 16.

The trial judge did not give an alibi jury instruction and defense counsel never requested an alibi instruction. After deliberating for nearly a day, the jury found Petitioner guilty of first-degree burglary, armed robbery, and possession of a weapon during commission of a violent

crime. App. 561, l. 24 – App. 562, l. 13. The jury was hung on the murder charge and the judge declared a mistrial on that charge. App. 566, ll. 8 – 12.

Petitioner was sentenced to life imprisonment for the first-degree burglary charge, thirty years for the armed robbery, and five years for the possession of a weapon during commission of a violent crime. App. 585, l. 8 – App. 586, l. 6. The sentences were to run concurrently. Petitioner appealed his conviction and sentence.

Chief Deputy Appellant Defender Wanda H. Carter represented Petitioner on appeal. On August 11, 2009, a brief was filed on Petitioner's behalf pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967). On August 25, 2010, the South Carolina Court of Appeals dismissed Petitioner's appeal in an unpublished opinion. State v. Frazier, Op. No. 2010-UP-391 (S.C. Ct. App. filed August 25, 2010).

PCR Hearing

Petitioner filed a PCR application on July 29, 2011. App. 604. The State filed its return on February 28, 2012 requesting an evidentiary hearing. App. 610. Petitioner filed an amended PCR application on April 24, 2013. App. 615. Petitioner filed a second amended PCR application on January 22, 2014. App. 619.

An evidentiary hearing was held before the Honorable Brian M. Gibbons on January 22, 2014. App. 621. Kristy Goldberg represented Petitioner. App. 621. Walt Whitmire and David Spencer represented the State. App. 621.

Petitioner testified at the hearing. Petitioner asserted that when he went to trial, he had an alibi defense. App. 627, ll. 22 – 24. However, inexplicably, defense counsel never discussed an alibi jury instruction with Petitioner. App. 628, ll. 7 – 8. Petitioner did not even know what jury instructions were. App. 628, ll. 9 – 10.

Defense counsel did not recall requesting an alibi jury charge during the jury charge conference. App. 633, ll. 9 – 14. Counsel also did not recall the trial judge denying a request for an alibi charge. App. 633, ll. 15 – 17. Counsel stated that he did not have a strategic reason for not requesting an alibi charge. Counsel agreed that alibi charge was proper considering the alibi witnesses who testified at trial. App. 633, ll. 21 – 24.

Defense counsel admitted that Petitioner had an alibi and, thus, lacked the opportunity to commit the crime. App. 653, ll. 9 – 10. Counsel also pointed out the fact that the State could not “pinpoint the time of [Hursey’s] death.” App. 653, ll. 11 – 12.

Counsel recalled the jury requesting to see the time line that he created during closing argument. App. 634, ll. 16 – 18. In addition to requesting the timeline, the jury asked to re-hear testimony from three of the alibi witnesses. App. 634, ll. 19 – 21. Counsel asserted that the alibi jury charge issue was not preserved for appeal. Further, counsel agreed that the verdicts were “inconsistent.” App. 637, ll. 8 – 16. Counsel could not think of a reason why the jury would find Petitioner guilty of the burglary, armed robbery, and possession of a weapon but hung on the murder. App. 637, ll. 8 – 16.

After the testimony concluded, PCR counsel argued that trial counsel was ineffective for failing to request an alibi jury instruction, as there was no indication in the record showing counsel made the request and trial counsel agreed that an alibi charge would have been proper. App. 659, ll. 13 – 17. PCR counsel contended that Petitioner was prejudiced by trial counsel’s ineffective assistance because the State’s case “was entirely circumstantial.” App. 660, ll. 14 – 20. The only evidence presented were from witnesses who saw Petitioner before and after the murder and the small drop of blood found on the black bag which matched Carol Hursey’s DNA. App. 660, ll. 14 – 20.

PCR counsel also asserted that nine of the fifteen defense witnesses were related to Petitioner's alibi. App. 660, ll. 21 – 23. Counsel drafted a time line of events during closing. App. 660, ll. 24 – 25. Because the jury requested to see the timeline, it was actively considering Petitioner's alibi. App. 661, ll. 12 – 23.

Order of Dismissal

On December 2, 2015, the PCR court issued an order of dismissal. App. 685. The PCR court found that Petitioner's "allegation that counsel was ineffective for failing to request an alibi charge on the record is without merit." App. 689. The court wrote that an alibi charge was not warranted at trial because Petitioner's "whereabouts" between 7:00 a.m. and 10:00 a.m. were not accounted for. App. 690. Therefore, according to the court, the trial judge "would have correctly denied an alibi jury charge." App. 690.

On January 11, 2016, Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCF. App. 704. The PCR court denied Petitioner's motion to alter or amend on January 27, 2016. App. 713. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred by finding trial counsel provided effective representation where counsel failed to request an alibi jury instruction where counsel introduced evidence that Petitioner was with other people several miles away during the time frame of Carol Hursey's death, and there were no eyewitnesses or forensic evidence directly placing Petitioner at the crime scene.

Defense counsel introduced evidence that Petitioner was with more than one person between the hours of 8:30 a.m. and 4:00 p.m. the day of Carol Hursey's death. In fact, there was evidence presented that Petitioner was several miles away from the Hursey residence during the time frame of Hursey's death.

This Court has held that trial counsel's failure to request an alibi charge where there is evidence presented that the defendant was in another place at the time the crime was committed is deficient representation. Ford v. State, 314 S.C. 245, 42 S.E.2d 604 (1994). Likewise, the "failure to give an alibi charge, where the defendant claims to be at another place, is reversible error." Riddle v. State, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992). "An alibi charge is considered especially crucial when the evidence is entirely circumstantial." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Moreover, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro, 317 S.C. at 294, 454 S.E.2d at 313 (citing Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)).

Here, defense counsel was deficient for failing to request an alibi jury instruction. Because counsel presented evidence that Petitioner was with other people several miles away during the time frame of Carol Hursey's death, counsel should have requested the alibi

instruction. There were no eyewitnesses or forensic evidence directly placing Petitioner at the crime scene. Thus, the State's case was entirely circumstantial.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “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,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent that ‘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. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, Petitioner was entitled to an alibi jury instruction. Both Petitioner and defense counsel agreed that Petitioner’s primary defense was his alibi. Sidney Hursey asserted that he left his house for work at 6:00 a.m. and returned home around 2:30 p.m. on August 14, 2003.

The coroner determined Hursey's time of death was 8:00 a.m. that morning. However, the forensic pathologist determined that Hursey died between 4:00 a.m. and 3:00 p.m. that day. The State failed to present evidence which pinpointed the exact time of Hursey's death.

Petitioner's sister, Dorothy Drawdy, stated that Petitioner arrived at her house at 6:45 a.m. that morning and left with her husband at 7:00 a.m. to go to work. Although Petitioner got out of the husband's truck before making it to work, Petitioner was observed by Terry Bolton between 8:30 a.m. and 10:00 a.m. walking along the road near Elbert Bolton's place, where Terry Bolton took Petitioner after picking him up. Bolton's place was nearly ten miles from the Hursey residence. Both Terry and Elbert Bolton asserted that Petitioner was at the residence with them until 3:00 or 4:00 p.m. that afternoon when Terry Bolton drove Petitioner to his father's house.

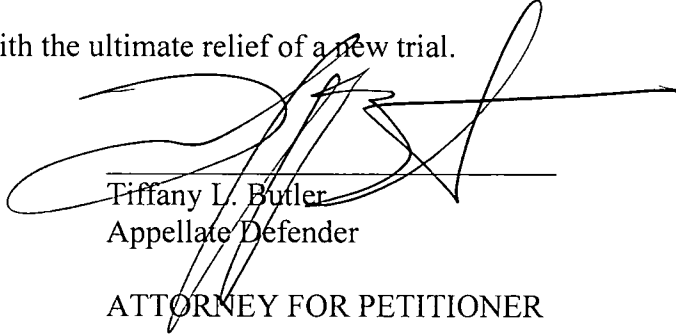
The State presented no eyewitnesses or forensic evidence directly placing Petitioner at the crime scene. In fact, the State's case was entirely circumstantial. At the PCR hearing, counsel failed to articulate a strategy to justify his failure to request an alibi jury charge. Counsel stated multiple times during the hearing that his goal was to show the jury that Petitioner could not have murdered Carol Hursey because Petitioner lacked the opportunity.

Because the jury asked to listen to three of the alibi witnesses' testimony and requested to see defense counsel's timeline used during closing argument, the jury clearly considered the alibi evidence. If counsel had requested an alibi jury charge, the trial judge would have granted counsel's request. There is a reasonable probability that if the jury had been given an alibi charge, it would have found Petitioner not guilty on all charges.²

² Although the rule of inconsistent verdicts was abolished in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the jury in the present case was clearly bothered by the timeline and could not find Petitioner guilty of the murder. The jury found Petitioner guilty of everything else as a compromise, which prejudiced Petitioner who is serving a life sentence.

CONCLUSION

For the reasons argued above, Petitioner Johnnie Frazier respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.



Tiffany L. Bufler
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Brian M. Gibbons, Circuit Court Judge

JOHNNIE FRAZIER

PETITIONER,

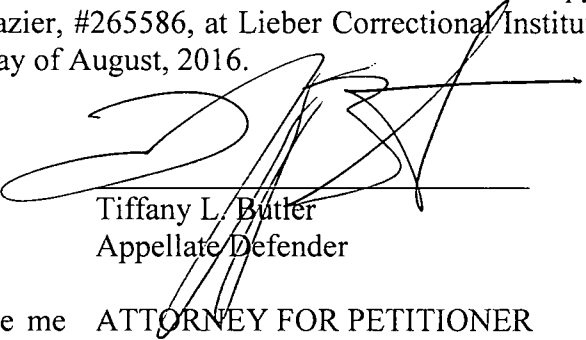
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Johnnie Frazier, #265586, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 10th day of August, 2016.



Tiffany L. Butler
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 10th day of August, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026