

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Court of Common Pleas
The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2015 – 002513
Lower Court Case No. 2014-CP-38-0798

RECEIVED

OCT 26 2016

S.C. SUPREME COURT

Dyzshon R. Boykins, #354669,

Petitioner-Respondent,

v.

STATE OF SOUTH CAROLINA,

Respondent-Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT-
PETITIONER**

ALAN WILSON
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ATTORNEYS FOR RESPONDENT-PETITIONER

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PETITIONER'S QUESTION PRESENTED

Did the PCR court err by finding counsel provided effective representation where counsel failed to fully investigate Petitioner's alibi defense and adequately prepare for trial since Petitioner only pled guilty because counsel was not fully investigating his alibi defense and Petitioner did not think counsel was prepared to go to trial?

STATEMENT OF THE CASE

Petitioner-Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Orangeburg County Grand Jury indicted Petitioner-Respondent at the November 2011 term of General Sessions for Armed Robbery (2011-GS-38-1722) and Possession of a Weapon during the Commission of a Violent Crime (2011-GS-38-1723). Mark Wise, Esquire represented Petitioner-Respondent on these charges.

On February 11, 2013, pursuant to negotiations, Petitioner-Respondent waived presentment to the grand jury and pleaded guilty to Entering a Bank with Intent to Steal (2011-GS-38-1722). The Honorable Eugene C. Griffith accepted the solicitor's recommendation and sentenced Petitioner-Respondent to seven (7) years' imprisonment. The Possession of a Weapon during the Commission of a Violent Crime charge was *nolle prossed*. Petitioner-Respondent did not appeal his plea or sentences.

Petitioner-Respondent filed his application for post-conviction relief (PCR) on June 30, 2014. (2014-CP-38-00798). (App. p. 19-27). Respondent-Petitioner filed a Return and Partial Motion to Dismiss on February 23, 2015, arguing that the application was filed outside the statute of limitations. (App. p. 28-32). A hearing was held on May 22, 2015 before the Honorable Maite Murphy. (App. p. 33). Petitioner-Respondent was represented by Jonathan D. Waller, Esquire. (App. p. 33). The State was represented by Assistant Attorney General J. Clayton Mitchell, III. (App. p. 33). Judge Murphy denied the State's motion to dismiss on timeliness grounds, and also denied Petitioner-Respondent relief on the merits by order filed August 26, 2015. (App. p. 62-70). The State filed a Petition for Writ of Certiorari challenging the

ruling that the application was subject to an exception to the statute of limitations. Respondent-Petitioner filed a Petition challenging the ruling on the merits of the case and also filed a Return to the State's Petition. This Return 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Certiorari is not warranted where the PCR court correctly found that Petitioner-Respondent knowingly and voluntarily pleaded guilty after Counsel reasonably advised him that an alibi defense would likely not be successful.

Petitioner-Respondent argues that Counsel was ineffective for failing to further investigate an alleged alibi defense. He argues that further investigation would have solidified his alibi and that he would not have admitted to committing the crime and pled guilty if he could have presented a viable alibi defense at trial. This issue is without merit. Counsel properly investigated the alibi defense by contacting the witnesses provided by Petitioner-Respondent. Since their statements were not concrete and did not make it impossible for Petitioner-Respondent to have committed the robbery, then Counsel's advice that the defense would likely not be successful was reasonable and supported by the evidence.

How The Issue Was Raised

Petitioner-Respondent pleaded guilty to a recommended term of seven years' imprisonment. At his plea, he admitted to robbing the bank with a firearm. (App. p. 6). At the PCR hearing, Petitioner-Respondent testified he initially wanted to proceed to trial and declined the solicitor's earlier plea offers. (App. p. 49-50). He testified that he told Counsel he was in Georgia when the crime took place. He alleged that Counsel should have further investigated an alibi defense. (App. p. 49). Counsel contacted Petitioner-Respondent's mother, step-mother, and father in hopes of corroborating the alibi. (App. p. 49). Counsel testified that he was not able to make the alibi "concrete" and likely would not be able to show that Petitioner-Respondent was in Georgia if the case went to trial. (App. p. 57).

Analysis

Petitioner-Respondent's argument is without merit. Counsel adequately investigated

Petitioner-Respondent's alleged alibi and was unable to substantiate the defense. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). "[S]ince 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." State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only *less likely* the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012). "To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime." State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). "A simple denial of one's presence at the scene does not constitute an alibi." Id.

Here, there is clearly evidence to support the PCR court's ruling. Counsel reasonably investigated the alibi defense and spoke to the only witnesses provided to him by Petitioner-Respondent that could corroborate the defense. The information provided by Petitioner-Respondent's family members was not helpful and did not amount to a valid alibi defense. In Counsel's view, the family members would be unable to credibly testify that Petitioner-Respondent was in Georgia when the crime was committed. Notably, Petitioner-Respondent told Counsel that he would provide him with additional information that would corroborate his alibi defense, but that information never came. (App. p. 56-57). Counsel cannot be faulted for failing to substantiate an alibi when Petitioner-Respondent was unable to provide him with any

witnesses or evidence attesting he was in Georgia. See Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984) (“The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.”).

In addition, Petitioner-Respondent failed to present the PCR court with any evidence to support the alibi defense other than his own non-credible testimony. No witnesses and no evidence were presented to substantiate the alibi at the PCR hearing. Petitioner-Respondent failed to meet his burden of production. He failed to provide the court sufficient evidence to establish a *physical impossibility* that he was not involved in bank robbery. See Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) (speculation and conjecture will not support a finding of ineffective assistance of counsel). The fact that Petitioner-Respondent confessed to a witness, was caught on surveillance video, and was picked out of a photo lineup made it difficult for him to deny his guilt.

The PCR court did not err in finding Petitioner-Respondent failed to show he would have proceeded to trial had the alibi defense been further investigated. Petitioner-Respondent conceded that he pled guilty to avoid risking a lengthy prison term and took advantage of a favorable plea deal. He testified multiple times that he pled guilty because he was “tired” and therefore wanted to put the case behind him. (App. p. 50-51). He did that by admitting his guilt and pleading. Petitioner-Respondent was aware that he could have attempted to present an alibi defense if the case had gone to trial, but he instead waived that defense.

Finally, Petitioner-Respondent waived any defenses after he knowingly and voluntarily pleaded guilty. He cannot now go back and challenge Counsel’s performance in failing to

substantiate an alibi defense when he has fully admitted that he robbed the bank. “A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.” Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably, the South Carolina Supreme Court has held “[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process.” Id (citations omitted). “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Because Petitioner-Respondent pleaded guilty and was found to have done so knowingly and voluntarily, Respondent-Petitioner asks this Court to deny the petition.

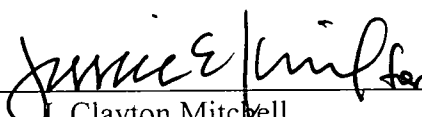
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner-Respondent's application. Should this Court grant Certiorari, Respondent-Petitioner requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

October 26, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

Appeal from Orangeburg County
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

DYZSHON R. BOYKINS,

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THE STATE OF SOUTH CAROLINA,

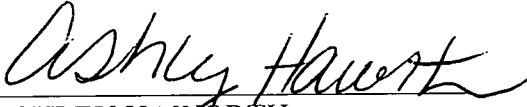
RESPONDENT-PEITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

Tiffany L. Butler, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 16th day of October, 2016


ASHLEY HAWORTH
LEGAL ASSISTANT



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OCT 26 2016

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 26, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Dyzshon R. Boykins v. State of South Carolina
Appellate Case No. 2015-002513
Lower Court Case No: 2014-CP-38-0798

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/ah
Enclosures

cc: Tiffany L. Buter, Esquire