STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

DARRELL L. GOSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX FROM THE COURT OF APPEALS

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INDEX

The South Carolina Court of Appeals

Darrell L. Goss, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-204386

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

Thomas C. Hoff J.

Paul E. Short, Jr. J.

A. Kee J.

Columbia, South Carolina

cc: Ashleigh Rayanna Wilson, Esquire
David Alexander, Esquire
Alan McCrory Wilson, Esquire

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The South Carolina Court of Appeals

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July 27, 2016

Mr. David Alexander, Esquire
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PO Box 11589
Columbia SC 29211

Mr. James Rutledge Johnson, Esquire
PO Box 11549
Columbia SC 29211

Re: Darrell L. Goss v. The State
Appellate Case No. 2011-204386

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings 7/27

CLERK

cc: Ashleigh Rayanna Wilson, Esquire
Alan McCrory Wilson, Esquire
The Honorable Deadra L. Jefferson

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Darrell L. Goss, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-204386

ON WRIT OF CERTIORARI

Appeal From Charleston County
J.C. Nicholson, Jr., Trial Judge
Deadra L. Jefferson, Post-Conviction Relief Judge

Unpublished Opinion No. 2016-UP-382
Heard March 7, 2016 – Filed July 27, 2016

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General James Rutledge Johnson, and Assistant

Attorney General Ashleigh Rayanna Wilson, all of Columbia, for Respondent.

PER CURIAM: Darrell L. Goss appeals his denial of post-conviction relief (PCR), arguing the PCR court erred in finding trial counsel was not ineffective for failing to properly investigate the case and discover and present an alibi defense. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) ("In reviewing the PCR court's decision, this Court is concerned only with whether any evidence of probative value exists to support the decision."); *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) ("We will uphold the findings of the PCR court when there is any evidence of probative value to support them."); *Davie v. State*, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case."); *Vail v. State*, 402 S.C. 77, 89, 738 S.E.2d 503, 509 (Ct. App. 2013) (providing "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel" (quoting *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006))); *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" (alteration by *Ard*) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986))); *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) ("The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made." (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984))).

AFFIRMED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

DARRELL L. GOSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2011-204386

Opinion No. 2016-UP-382

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner requests rehearing on this case with the ultimate relief of reversing the PCR court and granting petitioner a new trial. Respectfully, this Court's opinion errs in finding that counsel made an investigation that would have allowed a strategic decision and in crediting the PCR court's findings that contained a *de facto* adverse credibility finding against witnesses of whom the court took "judicial notice" that they would provide petitioner with a complete alibi.

Trial counsel was ineffective because he failed to investigate and present an alibi defense. The citations in this Court's opinion indicate that deference was paid to trial counsel's strategy.

Respectfully, this portion of the Court's opinion is erroneous because trial counsel failed to conduct any investigation that would have allowed him to make a reasonable strategic decision about an alibi. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Trial counsel's testimony regarding the alibi defense was as follows:

- "I didn't know about an alibi. I'm not saying there wasn't one, I didn't know about one, and if I should have known about that, I'm wrong. First time I've heard about alibi, it was after the case was tried. If that's my fault, it's my fault." App. 656, ll. 12 – 16.
- "If there was an alibi I didn't know about it, all right, and it's my fault for not knowing about it." App. 660, ll. 18 – 20.
- "I wasn't prepared for an alibi defense because I didn't know about it, and, again, that's my fault. I'm wrong. I'll make it clear." App. 665, ll. 13 – 16.

It is also clear that petitioner gave trial counsel a list of his alibi witnesses at jury selection because the names of these witnesses were called during voir dire. App. 633, l. 13 – 14, l. 7. App. 638, l. 18 – 641, l. 19. App. 17, l. 1 – 19, l. 9.

Even though petitioner was incarcerated from the time of his arrest until trial, trial counsel stated that even if he had known potential alibi witnesses existed, he would have put the burden on petitioner to go find the witnesses and have them come to his office. Regarding this strategy, he said, "It didn't happen, and if it was my fault, I was wrong." App. 672, ll. 12 - 17. Trial counsel's investigation in this case was limited to receiving the discovery from the State. He did not interview any witnesses nor did he hire an investigator. App. 665, ll. 18 – 25. This investigation was not constitutionally adequate. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

The PCR court's conclusions constitute legal error. The PCR court held that "counsel made a valid strategic decision to only call Applicant's mother as a witness at trial." App. 696. The PCR court found that applicant did not give counsel his alibi witnesses until after the trial

and that even if trial counsel had known about them, it would have made no difference because the witnesses "were family or had a prior criminal record." App. 698. The PCR court made the same error as trial counsel—discounting the testimony of petitioner's alibi witnesses without ever hearing them speak. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014).

The PCR court improperly speculated that trial counsel would not have presented an alibi defense even if he knew about it. This conclusion is based on a *de facto* credibility finding regarding the alibi witnesses. The PCR Court took judicial notice of the witnesses who were prepared to testify that petitioner was at a baby shower during the robbery. Despite dispensing with their live testimony, the PCR judge essentially made a finding that their testimony would not have been credible because they were friends and relatives of petitioner. Appellate counsel respectfully submits that because of the nature of petitioner's alibi (his son's baby shower), the only witnesses who would have been in attendance would have been petitioner's friends and family. The PCR court's conclusion is illogical. Without observing these witnesses or hearing them speak, the PCR court inexplicably concluded that a jury would have disregarded their testimony. A PCR court should not be allowed to make a credibility finding without hearing a witness's testimony.

The PCR court also improperly speculated that even if trial counsel had known about the evidence of Sharon Goss purchasing a gun and clothing, he would not have called Sharon Goss. The PCR judge speculated that trial counsel would have elicited this testimony from Thomasina. Such speculation also does not create a reasonable trial strategy because trial counsel discredited Thomasina himself. During his closing argument, trial counsel made the following comments about Thomasina:

> We got Ms. Goss, **who has lied before**, and I'm not going to sit here and tell you she's Mother Theresa, but she came in and told you things that she knew. Take it for what you believe it's worth, but she told you she bought all that and she bought

> all stolen goods, **and, of course, she would say what she needs to protect her son.** App. 484, ll. 9 – 15 (emphasis added).

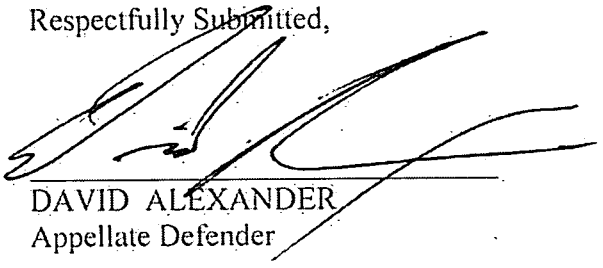
These statements about his only witness destroyed his own defense.

The solicitor seized on these remarks during his closing argument, saying that trial counsel "admitted it's a mom looking out for her son, and they needed to somehow explain why in the world you have all these tags. Otherwise, that is one heck of a random shopping spree today after a clothing store got robbed." App. 500, ll. 5 – 9. Thomasina's prior convictions made her a poor choice as the only defense witness. Even if the other alibi witnesses had prior records (a fact which is **not** in evidence below), it does not help to choose a single witness with a prior convictions for lying over multiple helpful witnesses who may or may not also have prior convictions. Presenting testimony of the other witnesses through Thomasina instead of putting them on the stand only makes sense if Thomasina had no prior record. The PCR court erred in manufacturing an illogical strategy for trial counsel.

Petitioner can also demonstrate prejudice. First, the PCR court took judicial notice that petitioner's alibi witnesses would all say he was at his son's baby shower during the commission of the robbery. This meets the legal definition of an alibi. The error on the prejudice prong is similar to Walker. In Walker, the Court of Appeals found that the alibi was insufficient because the witness could not place the defendant with her on the specific date of the crime. Walker at 404, 756 S.E.2d at 146. The Supreme Court reversed, finding that the court's definition of alibi was too narrow. Id. at 405, 756 S.E.2d at 147. Similarly, the PCR court here disregarded petitioner's alibi witnesses because it surmised (without actually taking their testimony) that they were related to him or had criminal records. This was error because as a result of taking judicial notice of their testimony, the only record before the court was that petitioner had an alibi that satisfied the legal definition.

Had trial counsel prepared and presented an alibi defense, there is a reasonable probability that the outcome of the trial would have been different. The victim recognized petitioner from his earlier purchases in his store and still did not identify petitioner as one of the robbers, even though he could identify his co-defendant. Petitioner's presence in the store as a customer was a potential explanation for the fingerprints on the door. No other physical evidence directly tied petitioner to the robbery. See State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) (holding that fingerprint was insufficient to withstand directed verdict motion in a burglary case). His brother's testimony that he purchased the gun and clothes would have explained another key piece of the State's evidence against petitioner. In this wholly circumstantial case, an alibi defense would have been critical. This Court should grant rehearing, reverse petitioner's conviction, and remand for a new trial.

Respectfully Submitted,



DAVID ALEXANDER
Appellate Defender

This 10th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

DARRELL L. GOSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Darrell L. Goss, #305517, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 10th day of August, 2016.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 10th day of August, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

Darrell L. Goss, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-204386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

FILED
September 26, 2016

cc:
Ashleigh Rayanna Wilson, Esquire
David Alexander, Esquire
Alan McCrory Wilson, Esquire
James Rutledge Johnson, Esquire

Ruston Wesley Neely, Esquire
Darrell L. Goss, #305517