

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2016 – 000387
Lower Court Case No. 2011-CP-32-2879

RECEIVED

DEC 28 2016

S.C. SUPREME COURT

JOHNNIE FRAZIER, #265586,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT

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RESPONDENT'S COUNTER ISSUES

- I. Certiorari is not warranted where the PCR court correctly found Counsel was not ineffective when he did not request an alibi instruction because the evidence did not support the instruction.
- II. Certiorari is not warranted where the PCR court correctly found Petitioner failed to establish any prejudice from Trial Counsel's alleged deficiency in not requesting an alibi charge.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Petitioner was indicted at the March 2006 term of the Lexington County Grand Jury for possession of a firearm during the commission of a violent crime (2009-GS-32-0667); armed robbery (2006-GS-32-0670); and burglary in the first degree (2006-GS-32-0671).¹ (App. pp. 714-719.) Petitioner was represented by Wayne Floyd, Esquire. From November 26-28, Petitioner proceeded to trial by jury before the Honorable James W. Johnson, after which he was convicted as indicted on each of the three charges. (App. p. 562.) Judge Johnson sentenced him to confinement for a period of five years for violating the firearms provision; thirty years for armed robbery; and life for burglary. (App. pp. 585-86.) Each sentence was set to run concurrently. (Id.)

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Wanda H. Carter, Esquire, represented Petitioner on appeal. (App. p. 588.) The South Carolina Court of Appeals dismissed Petitioner's appeal in a written Order. State v. Frazier, Op. No. 2010-UP-391 (S.C. Ct. App. filed August 25, 2010). (App. pp. 602-603.) The Remittitur was issued on May 5, 2011.

Petitioner then filed an application for post-conviction relief (PCR) on July 29, 2011. (App. p. 604.) Respondent made its Return and Motion to Dismiss requesting the matter be summarily dismissed on or about February 28, 2012. (App. p. 610.) Amended applications were filed on October 1, 2012, and April 24, 2013. (App. pp. 615-20.) An evidentiary hearing into the

¹ Petitioner was also indicted for murder (2006-GS-32-0668). Petitioner proceeded to trial on this indictment at the same time as his burglary, armed robbery, and weapon possession indictments. However, the jury was unable to reach a verdict as to murder and a mistrial was declared on that offense only.

matter was convened on January 22, 2014, at the Lexington County Courthouse before the Honorable Brian M. Gibbons. (App. p. 621.) Petitioner was present and was represented by Kristy Goldberg, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

On January 11, 2016, Judge Gibbons issued an order denying and dismissing Petitioner's PCR application with prejudice. (App. p. 685.) Petitioner filed a motion to alter or amend the order on the same day (App. p. 704), and the PCR Court filed an order denying the motion to alter or amend on February 2, 2016 (App. p. 713). Petitioner filed his notice of appeal on or about February 19, 2016, and his Petition for Writ of Certiorari on August 10, 2016. This Return follows.

STATEMENT OF THE FACTS

Sidney Hursey and his wife, the victims in this case, knew Petitioner because he worked for them, mostly doing work for Mrs. Hursey. (App. p. 48-49.) One job Petitioner did for the Hurseys was installing the front door of their home. (App. p. 58.) Petitioner also rented a house from the Hurseys until he was evicted by Mrs. Hursey about one to two weeks prior to her murder. (App. p. 49.)

Scottie Carson, who lived with Petitioner in the days leading up to the murder and robbery, testified Petitioner approached him on one or more occasions inquiring about acquiring a "clean" gun. (App. pp. 196-97). Petitioner informed Carson the victim kept a large amount of money in her house. (Id.) Petitioner's live-in girlfriend at the time of the murder testified Petitioner told her around the time Mrs. Hursey evicted Petitioner, referring to Mrs. Hursey, that "one day that bitch is going to get what she is asking for." (App. p. 183). The same witness testified Petitioner was angry at the victims for demanding too much work from him in exchange

for the money he owed them and also testified Petitioner had commented several times about how the victims kept “thousands” of dollars in cash in their home. (App. pp. 177, 184.)

The day the victim was murdered, her car and a large amount of money and jewelry were stolen from the victims’ house. (App. pp. 57-58; 67.) A witness testified she saw Petitioner coming from the victims’ driveway driving *the victim’s car* the day she was murdered.² (App. pp. 210-11; pp. 214-18.) The victim’s abandoned and destroyed vehicle was discovered near the home of Petitioner’s father. (App. p. 161.) Petitioner was seen with a book bag the night before and after the robbery and murder. (App. pp. 253-54; p. 270; p. 300.) That bag was subsequently recovered by police and determined to contain both the victim’s blood and DNA evidence linking it to Petitioner, as well as personal effects belonging to Petitioner. (App. pp. 336-37; 390-96.)

On August 14, 2003, Sidney Hursey, victim of the burglary and husband of the murder victim, testified he went to work at 6 a.m. and returned home around 3 p.m. that same day and discovered his wife’s body in their bedroom and several items stolen from the home. (App. pp. 52-54.) No other witness entered the bedroom during this time frame.

Detective Grimes testified the victim’s body appeared to be in full rigor mortis when law enforcement removed her from the scene that night at 10 p.m. (App. p. 102.) She noted that the body of a recently deceased person typically takes twelve hours to reach a state of full rigor mortis. (App. p. 106.) Thus, based upon all the relevant information, Dr. Sexton testified that, to a reasonable degree of medical certainty, the victim died approximately between 4 a.m. and early evening on August 14, 2003, from a gunshot wound. (App. p. 141.) Tommy Jaco, senior deputy

² This witness was challenged on the stand about her inconsistent testimony and statements regarding the times in which she saw Petitioner driving away from the victim’s home in the victim’s car. (App. pp. 210-220.)

coroner at the time of the murder, testified he felt 8 a.m. was a time of death consistent with the physical findings and the information provided by witnesses and law enforcement. (App. pp. 445-46.)

The following is a chronological account of the relevant witness testimony at trial concerning Petitioner's whereabouts on August 13 to August 14, 2003: Terry Bolton testified he was with Petitioner at Elbert Bolton's home on August 13, 2003. (App. p. 464.) Terry Bolton recalled doing drugs with Petitioner but was unable to remember what time Petitioner left Elbert Bolton's residence. (App. p. 464.) Terry Bolton spent the night at Elbert's residence. (App. p. 462.) Elbert Bolton also testified Petitioner left his residence late on August 13, 2003. (App. p. 453.)

Stanley Gleaton testified he abused crack cocaine with Petitioner at Elbert Bolton's residence on August 13, 2003. (App. p. 251.) Gleaton alternatively testified he stayed up until daybreak with Petitioner. (App. p. 252.) Gleaton testified he believed daybreak to be around 7 a.m. on August 14, 2003. (App. p. 262.) When Gleaton awoke somewhere between 10 a.m. and 12 p.m., he testified Petitioner was gone from Elbert Bolton's residence. (App. p. 252.)

Dorothy Drawdy, Petitioner's sister, testified Petitioner was in her Gaston home at 6:45 a.m. on August 14, 2003. (App. p. 483.) Drawdy testified Petitioner arrived on bicycle to catch a ride with her husband to work. (App. p. 479.) Drawdy left her home at 7:00 a.m. in her husband's vehicle. (App. p. 480.) Petitioner did not make it all the way to the worksite after he had an argument with Drawdy's husband. (App. p. 481.)

Terry Bolton testified he saw Petitioner walking down the side of the road at some point between 8:30 and 10:00 a.m. and offered him a ride. (App. p. 466.) Terry Bolton was only certain he picked up Petitioner by 10 a.m., admitting he was unsure of when, exactly, "because at

that time, [he] didn't have a value of time." (App. p. 464.) Terry Bolton testified he drove Petitioner to Elbert Bolton's residence. A few hours later, he testified he drove Petitioner to his father or mother's home. (App. p. 462.) Terry Bolton admitted he smoked crack and marijuana and consumed liquor on the day in question. (App. p. 466.)

Jacqueline Burke testified to her interactions with Petitioner. Counsel questioned Burke on whether she gave a statement to police that she saw Petitioner walking on Old Wire Road at 10:30 a.m. on August 14, 2003. (App. p. 279.) Burke did not recall the statement or acknowledge its validity. (App. p. 279.)

Elbert Bolton testified Petitioner was at his residence at 10 a.m. on August 14. (App. p. 454.) Elbert Bolton also testified Petitioner left his residence around 2 or 3 p.m. that afternoon. (App. p. 454.) Stanley Gleaton testified Petitioner returned to Elbert Bolton's residence on a bicycle at night on August 14, 2003. (App. p. 260.)

PCR Hearing

At the PCR hearing, Trial Counsel testified he has thirty-eight years of experience and is death-penalty certified. Trial Counsel explained the charge conference was held off the record, and he could not recall what was discussed in that charge conference. (App. pp. 633, 642-43.) Trial Counsel could not recall either way if the trial court denied a request for an alibi charge (App. p. 633), and while he "would hope" he would have aggressively asked for an alibi charge, he "didn't put it on the record so [he] can't say that [he] did" (App. p. 654). Trial Counsel claimed to put forward a complete alibi case and was unaware of a reason why the trial court would have denied an alibi charge if he had asked for one because they had the "whole time covered." (*Id.*)

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 PCR action, “[t]he burden of proof is on the petitioner to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the 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. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Petitioner must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S.Ct. at 2064). Second, counsel’s deficient performance must have prejudiced 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. **Certiorari is not warranted where the PCR court correctly found Counsel was not ineffective when he did not request an alibi instruction because the evidence did not support the instruction.**

Petitioner argues Trial Counsel was ineffective for failing to request an alibi jury charge. However, Petitioner was unable to substantiate the alibi defense. The evidence at trial was insufficient to support an alibi instruction because the witnesses' statements failed to establish the impossibility of Petitioner's guilt. Therefore, this issue is without merit. Because the witnesses' statements were not concrete and did not make it impossible for Petitioner to have committed the armed robbery and burglary, Petitioner did not meet his burden of making a *prima facie* showing of a complete alibi and, therefore, Counsel did not fail to render reasonably effective assistance under prevailing professional norms.

“[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.

Our Courts have held the propriety of an alibi charge is contingent upon evidence of a

complete alibi. State v. Baker, 411 S.C. 583, 591, 769 S.E.2d 860, 865 (2015) (*quoting Robins* at 375, 271 S.E.2d at 320). The South Carolina Supreme Court has unequivocally held that **any** gap in the relevant timeframe precludes the trial judge from issuing an alibi charge. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).

Here, Petitioner failed to meet his burden of proof, and there is clearly evidence to support the PCR court's ruling. Petitioner failed to provide the court sufficient evidence to establish a **physical impossibility** that he was not involved in the armed robbery and burglary.

As an initial matter, because Petitioner was not convicted of the victim's murder and only convicted of the armed robbery and burglary,³ the time line Petitioner needed to account for was linked to victim Sidney Hursey, the murder victim's husband, who established the robbery occurred between 6 a.m. and 3 p.m. on August 14, 2003. At trial, no witness testified with any certainty to Petitioner's whereabouts between 7:00 a.m. and 10:00 a.m.⁴ on August 14, 2003, the day of the murder and the robbery. Dr. Sexton gave his expert opinion that the victim died between 4 a.m. and the early evening of August 14, 2003. Trial Counsel testified he exhausted his alibi investigation in anticipation of trial. Furthermore, Petitioner presented no new evidence at the PCR hearing on his alibis or the State's timeline. The record clearly shows an alibi charge was not warranted at Petitioner's trial because no evidence or testimony in the record that definitively accounted for Petitioner's whereabouts between 7 a.m. and 10 a.m. on the morning of the home invasion and murder. Thus, counsel's performance was not deficient in failing to request an inappropriate jury charge that the trial judge would have correctly denied.

³ Petitioner was also convicted of possession of a weapon during the commission of a violent crime.

⁴ Terry Bolton testified he picked up Petitioner between 8:30 a.m. and 10 a.m., but he was only **certain** he picked up Petitioner by 10 a.m., admitting he was unsure of when, exactly, "because at that time, [he] didn't have a value of time." (Trial Tr. p. 462).

The PCR court did not err in finding Trial Counsel committed no error and that Petitioner was unable to meet his burden of establishing any prejudice from the alleged error.

II. Certiorari is not warranted where the PCR court correctly found Petitioner failed to establish any prejudice from Trial Counsel's alleged deficiency in not requesting an alibi charge.

The PCR Court correctly found Petitioner had not met his burden of establishing prejudice where the jury charge as a whole made clear it was the State's burden to establish Petitioner could have committed these crimes and where the solicitor did not suggest that burden had shifted with his closing argument to the jury.

This Court has held that failure to request an alibi charge where there is evidence presented 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). 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 (1993). 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).

This Court's previous holdings, however, are distinguishable. In both Riddle and Roseboro, this Court found the solicitor disparaged the defendant's alibi, making it all the more important that the judge give the jury the correct impression as to where the burden of proof lay. Roseboro, 317 S.C. at 294-95, 454 S.E.2d at 313-14; Riddle, 308 S.C. at 309-10, 418 S.E.2d at 363-64.

In Roseboro, the solicitor asked the jury to consider the facts in total and challenged the evidence presented by the defendant's alibi witness. Roseboro at 294-95, 454 S.E.2d at 313-14. In Riddle, the trial counsel testified alibi was the **only** defense, and the solicitor argued the judge

would charge the jury with legal defenses and the jury **could only look** at the defense of alibi in this case. The subsequent absence of any alibi charge gave rise to a conclusion by the jury that it was impermissible for them to consider alibi as a defense. Riddle 308 S.C. at 309-10, 418 S.E.2d at 363-64.

Furthermore, “[i]n evaluating whether a PCR petitioner has suffered prejudice as a result of a jury charge, the jury charge must be viewed ‘in its entirety and not in isolation.’” Gibbs v. State, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (quoting Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)).

Here, unlike in Riddle, alibi was not the only defense. Trial Counsel defended Petitioner with a third party guilt argument and also told the Trial Court “one of the things of our defense is that this matter was not properly investigated by the sheriff’s department. And they focused on [defendant] with tunnel vision and eliminated all other suspects except [defendant] with inadequate investigation.” (App. p. 166.) Further, the solicitor emphatically informed the jury in closing that the **State** bore the burden of proof and was required to prove Petitioner guilty beyond a reasonable doubt. (App. p. 493.) The solicitor’s only reference to defendant’s alibi defense was to note the same fact the Trial Court would have considered; the timeline was not sufficiently covered. (App. p. 525.) Unlike Roseboro, the solicitor in this case did not make comments in his closing that shifted the burden of establishing alibi on Petitioner.

Furthermore, looking at the jury charge in its entirety, the Trial Court further emphasized Petitioner was presumed innocent and the state bore the burden of proving guilt beyond a reasonable doubt. (App. p. 529.) The trial court charged the jury that Petitioner was not required to prove his innocence and the state was required to prove every essential element of the offense charged against him beyond a reasonable doubt. (App. p. 532.)

These distinctions are crucial. The jury heard all of the evidence Petitioner now claims would have entitled him to an alibi charge. The jury was also charged on where the applicable burdens lay, and there was nothing in the solicitor's closing argument to confuse that issue. The alibi charge merely reemphasizes the burden of proof requirements.

Here, the PCR judge correctly found Petitioner failed to meet his burden to prove prejudice. Certiorari should, therefore, be denied.

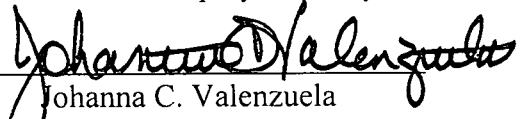
CONCLUSION

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's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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December 28, 2016

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JOHNNIE FRAZIER, #265586,

PETITIONER,

v.

THE 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:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 28th day of December, 2016


BRIANNA ARNONE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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DEC 28 2016

December 28, 2016

S.C. SUPREME COURT

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

Re: Johnnie Frazier, #265586 v. State of South Carolina
Appellate Case No. 2016-000387
Lower Court Case No. 2011-CP-32-2879

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
SC Bar No. 79834

JCV/bea
Enclosures

cc: Laura R. Baer, Esquire (2 copies)