

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 30 2016

CERTIORARI TO THE COURT OF APPEALS
Appeal from Charleston County
The Honorable Deadra L. Jefferson, Post-Conviction Relief Judge

S.C. SUPREME COURT

Opinion No. 2016-UP-382 (S.C. Ct. App. filed July 27, 2016)

Appellate Case No. 2016-002186

DARRELL L. GOSS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
S.C. Bar # 102089

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

INDEX.....1

QUESTION PRESENTED.....3

STATEMENT OF THE CASE.....4

ARGUMENT5

 The Court of Appeals correctly upheld the PCR court's ruling where the
 record contains probative evidence to support the PCR court's finding
 that trial counsel was not ineffective for failing to investigate or present
 an alibi defense.....5

CONCLUSION.....13

QUESTION PRESENTED

Did the Court of Appeals correctly uphold the PCR court's ruling where the record contains probative evidence to support the PCR court's finding that trial counsel was not ineffective for failing to investigate or present an alibi defense?

STATEMENT OF THE CASE

Respondent adopts Petitioner's procedural history.

ARGUMENT

The Court of Appeals correctly upheld the PCR court's ruling where the record contains probative evidence to support the PCR court's finding that trial counsel was not ineffective for failing to investigate or present an alibi defense.

Petitioner contends the post-conviction relief ("PCR") court only reached its conclusion by speculating about potential trial strategies. However, such a contention finds absolutely no support in the record and is clearly refuted by Counsel's testimony at the PCR hearing. Therefore, the Court of Appeals correctly upheld the PCR court's denial of relief because probative evidence exists to support its finding that Petitioner failed to carry his burden of proving ineffective assistance of Counsel. Accordingly, this Court should deny review.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional

norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant 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.

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)). Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

In denying Petitioner's relief, the PCR court found generally that Counsel's testimony was credible and Petitioner's was not. (App. p. 696). See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)). ("[on review this court] gives great deference to a PCR judge's findings where matters of credibility are involved."). The court found Counsel made a valid strategic decision to only call Petitioner's mother, Thomasina Goss, as a witness at trial, and that he was not ineffective for not calling Sharon Goss or other named witnesses at trial. (App. p. 696-97). The court also found that neither Petitioner nor Petitioner's mother informed Counsel of a potential alibi defense. (App. p. 697). In addition, the court found Counsel's testimony credible that he had trouble

communicating with Petitioner, and that it was "implausible" that neither Petitioner nor any of his family members found a way to inform Counsel of a potential alibi if one in fact existed. (App. pp. 697-98). Moreover, the PCR court found credible Counsel's testimony that "even if he knew about a potential alibi, he would not have presented an alibi defense unless it was airtight." (App. p. 698). The record unambiguously supports the PCR court's finding.

At the PCR hearing, Petitioner was prepared to call four witnesses to testify. The PCR court took judicial notice that those individuals were present and would testify that Petitioner was at his son's baby shower between the hours of 7:00PM and 9:00PM on the night of the crime, which occurred at approximately 7:30PM. (App. pp. 644-45). The Court also took judicial notice that Sharon Goss, Petitioner's cousin, would have testified he was with Petitioner's mother when she bought the stolen clothes and that he purchased a gun from the same group that was selling the clothes and placed it in his car. (App. p. 639, line 24-p. 640, line 9; p. 645, lines 3-14). James Smiley ("Counsel") testified he did not recall any information about Sharon Goss purchasing the pistol and placing it in the car, and that if he had known about it, he would have elicited it from Goss's mother "because, as he said, she was present . . . when Sharon purchased the gun." (App. p. 656, line 22-p. 657, line 4). Counsel testified he knew there were others who could have testified about the clothes being sold on the street, but that he used Thomasina Goss because, even though she had a record, he felt she was "persuasive and told the event very well." (App. p. 657).

Counsel testified he did not know about an alibi and the first time he heard about it was after trial. (App. p. 656). Counsel also acknowledged that he and Petitioner had trouble communicating, but that he did review discovery with him and discussed possible defenses with him including his theory of the case. (App. p. 665). Counsel testified he remembered going over

discovery with Petitioner. (App. p. 658, line 14). Counsel testified that as a general policy he goes over every page of discovery with his clients. (App. p. 658, lines 20-25). Counsel testified that he was unable to hire an investigator because Petitioner could not afford it. (App. p. 672). Counsel testified it was a circumstantial case, (App. p. 659, line 17), and that there were three major pieces of evidence: a palm print on the glass door of the store, a gun containing the victim's DNA evidence in it that was recovered from an automobile in the Goss family's front yard, and many items of clothing with tags still attached that were found inside the Gosses' home. (App. p. 653). He testified he felt they had defeated each piece of evidence through cross-examination and the testimony of Thomasina Goss. (App. pp. 659-60; p. 660, lines 17-18). He testified he felt they had defeated the gun, and if he had known or heard about Sharon purchasing the gun, it would have been something to consider, but he did not know if he would have called him regardless. (App. p. 659). He stated he would have probably asked the question of Thomasina while she was on the stand, but that it was hard to overcome that there was a gun with the victim's DNA on it in a car in the yard of the residence, even though he felt he had established the vehicle was not in Petitioner's possession or control. (App. p. 659). Counsel further testified he used Thomasina to explain all the clothes. (App. p. 659). Counsel stated he and Petitioner did not have a discussion about the alibi and that he thought they could defeat the case since it was a circumstantial case. (App. p. 660, lines 22-24). He stated he told Petitioner his theory of the case and felt he was prepared for trial. Counsel also testified:

As far as putting up other people to testify to the same thing that Thomasina had, strategically, to put her up there, she actually had a little bit of a record, but [she] speaks very well, and she came through. The other people were bolstering, to a certain degree, but that's not why I didn't put them up. It's my belief the more you put out there, they start pitting your people against each other, and I had a strong . . . witness who testified. So I didn't call—again . . . if I had known about the alibi, and if it was my fault of not knowing—and I can tell you, we had difficulty communicating.

...

I felt like, because it was circumstantial, and the three points that we had put up good, solid defense to each of those circumstances, and so even if I had had the alibi, unless it was airtight, I don't know if I, strategically, would have put it up there because you live and die by your alibi, and I thought we had a pretty . . . good case in defense[.]

(App. p. 660, line 25-p. 662, line 4). Finally, Counsel testified that he could not say in this case he would have raised the alibi defense because "[he] thought [they] had what [they] needed to beat the circumstantial elements of the case[.]" and that he "tend[s] not to put up an alibi unless [he] really [has] to." (App. p. 667, lines 1-8). Counsel also stated that he thinks "there is always skepticism when a family member testifies," but that, with respect to Thomasina Goss's testimony, she spoke well and was convincing, and that when he went over the testimony with her, he felt confident in what she was going to testify to and that it was going to be convincing. (App. p. 668). He further testified that she never mentioned the purchase of the gun by Sharon Goss, and that would have been very significant to him, but that even if he had known, putting Sharon on the stand would have given him "a little concern." (App. p. 668). He also agreed it was possible it still would have implicated Petitioner due to the fact they were related. (App. p. 669). Counsel stated that he very rarely uses an alibi because the jury "only listen[s] to the rest of the case if your alibi fails, and we had a good circumstantial defense." (App. p. 671).

Petitioner testified that he met with Counsel one time prior to his trial and that he never talked to Counsel about his case prior to trial. (App. p. 632). Petitioner testified that he gave Counsel the names of several potential witnesses at the beginning of his trial. (App. p. 632). He testified had Counsel interviewed him prior to trial, he would have given him the names of Sharon Goss, Benny Goss, Clifford Hartwell, and Angelique Gadsden (App. p. 633). He testified that Benny Goss, Clifford Hartwell, and Angelique Gadsden would have testified that they

witnessed individuals selling clothes on the street to his mother Thomasina Goss. (App. p. 633). He testified that Sharon Goss would have testified that he purchased the gun found in the car outside of the Petitioner's home that contained the victim's DNA from the individuals selling clothes on the street. (App. p. 640). Petitioner said he never discussed his alibi defense with Counsel. (App. p. 651-52). Lastly, Petitioner testified he would have told Counsel that he was at his son's baby shower on the day of the crime. (App. p. 634).

Respondent submits that the record contains ample evidence of probative value to support the PCR court's finding that Counsel effectively investigated the Petitioner's case, was never informed of the alibi defense or the purchase of the gun by Sharon, and made a strategic decision to only call Petitioner's mother to testify because he felt her testimony was convincing. To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Counsel gave credible testimony that he investigated Petitioner's case and believed he could defeat each piece of circumstantial evidence presented by the State. Counsel also gave credible testimony that he reviewed the discovery and was able to put together a defense he felt was very strong. Counsel's investigation of the facts surrounding the Petitioner's case was

further evidenced by his ability to give a summary of the State's evidence against the Petitioner at the evidentiary hearing.

In addition, Counsel clearly articulated a valid trial strategy for calling Thomasina Goss and not others to testify at trial. Counsel testified that he knew of others who witnessed the Petitioner's mother purchasing clothing from men on the street after the robbery, but that it was a part of his trial strategy to call Petitioner's mother to testify. He testified that he chose to call Thomasina as a witness at trial because she was very convincing, spoke very well, and would be able to tell the story of the event very well. In Jackson v. State, the Court held that counsel's choice to call one witness over another because he believed his testimony would be more credible was a valid trial strategy. 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998). Here, Counsel articulated the same rationale for calling Thomasina Goss to testify over others. Moreover, Thomasina Goss' testimony was the same as the potential witnesses presented by Petitioner at the PCR hearing and therefore would have been cumulative if presented at trial, and thus would not have affected the outcome. This Court held in Cherry v. State, that Counsel's failure to ensure presence of defense witness did not constitute deficient performance or prejudice defendant so as to constitute ineffective assistance where the witnesses' testimony would have been cumulative. 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the PCR court correctly found that Counsel was not ineffective for failing to investigate or call potential witnesses to give testimony that would have been identical to Thomasina Goss's testimony.

The PCR court correctly found Counsel was not ineffective for failing to call Sharon Goss to testify about his purchase of the gun found in a car outside of the Petitioner's home. "A fair assessment of attorney performance requires that every effort be made to eliminate the

distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland 466 U.S. at 689.

Here, Counsel gave credible testimony that he was not aware of the substance of Sharon Goss's testimony despite Counsel's close relationship and consultation with Thomasina Goss, and that regardless, had he known of such testimony prior to trial he would likely have elicited such testimony from Thomasina Goss instead. Counsel cannot be deemed ineffective for failing to call a witness whose testimony he was never informed of. Therefore, the record supports the PCR court's finding that Counsel was not ineffective for not calling Sharon Goss to testify.

Lastly, the PCR court's finding that Counsel was never informed of the alibi defense prior to trial is supported by ample evidence in the record.

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 particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.

Strickland 466 U.S. at 691. Not only did Counsel give credible testimony at the PCR hearing that he was not informed of an alibi prior to trial, but *Petitioner also testified* during the PCR hearing that he never told Counsel of his alibi. Prior to trial, the Petitioner testified that he told Counsel of several potential witnesses that were present and could give testimony identical to that of his mother, Thomasina Goss. However, he never indicated to Counsel prior to trial that he was present at his son's baby shower during the crime. Petitioner had ample opportunity to communicate this significant fact to Counsel prior to trial. Counsel could not have further investigated an alibi defense that he was never informed of. Counsel's performance at trial was based on the information that he knew at the time of time. Therefore, the PCR court's finding that

it was "implausible" that neither Petitioner nor any of his family members found a way to inform Counsel of a potential alibi if one in fact existed, (App. pp. 697-98), is supported by the record and not based on speculation.

Lastly, Petitioner was not prejudiced by Counsel's inability to pursue an alibi defense prior to trial because Counsel testified that even had he known of the existence of an alibi, he would not have presented that defense to the jury unless it was airtight. Therefore, the record contains ample evidence to support the PCR judges' findings, and this Court should deny review.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar # 102089

By:



ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

December 28, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 30 2016

CERTIORARI TO THE COURT OF APPEALS SUPREME COURT
Appeal from Charleston County
The Honorable Deadra L. Jefferson, Post-Conviction Relief Judge

Opinion No. 2016-UP-382 (S.C. Ct. App. filed July 27, 2016)

Appellate Case No. 2016-002186

DARRELL L. GOSS, #305517,

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:

David Alexander, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 28th day of December, 2016


BRIANNA ARNONE
LEGAL ASSISTANT