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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No.: 2016-001174

Frederick Flowers, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the record support the PCR judge's finding that Petitioner failed to prove ineffective assistance of counsel based on Counsel's failure to present Petitioner's cousin as an alibi witness at trial where, at the evidentiary hearing, the witness provided inexact testimony concerning the timing of events such that her testimony did not show that it was impossible for Petitioner to have committed the crime?

STATEMENT OF THE CASE

Petitioner (Frederick Flowers) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the July 2011 term of the Charleston County Grand Jury for murder (2011-GS-10-4314) and possession of a weapon during the commission of a violent crime (2011-GS-10-4317). Petitioner was represented at trial by Mary A. Ford, Esquire ("Counsel") sitting as primary counsel, and Beattie I. Butler, Esquire assisting. On August 31, 2014, Petitioner proceeded to a jury trial and was convicted of both charges. Petitioner was sentenced by the Honorable J.C. Nicholson, Jr. to imprisonment for concurrent terms of forty (40) years for murder and five (5) years for the weapons charge.

Petitioner filed a timely notice of appeal. Benjamin Tripp, Esquire of the South Carolina Office of Appellate Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Petitioner's behalf. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Flowers, Op. No. 2014-UP-185 (Ct. App. May 5, 2014). The Remittitur was returned on June 20, 2014.

Petitioner filed an application for post-conviction relief on August 26, 2014. An evidentiary hearing was held on December 17, 2015, before the Honorable Deadra L. Jefferson. Petitioner was represented at the hearing by James K. Falk, Esquire. J. Rutledge Johnson, Esquire, represented Respondent. Judge Jefferson denied and dismissed Petitioner's PCR application on May 18, 2016.

STANDARD OF REVIEW

This Court must affirm the PCR judge'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). In addition, 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)).

ARGUMENT

In light of the PCR judge's finding of overwhelming evidence of guilt, probative evidence supports the PCR court's finding that Counsel was not ineffective for not presenting Petitioner's cousin, Davetta Davenport, as an alibi witness at trial where Counsel made a reasoned decision not to present witnesses and where Davenport's testimony would not have entitled Petitioner to an alibi defense at trial.

The record supports the PCR judge's finding that Petitioner failed to prove Counsel was ineffective for not presenting Petitioner's cousin, Davetta Davenport, as an alibi witness.

In a PCR action, "[t]he burden of proof is on the Applicant 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), SCRCP)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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). The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. at 688. The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. at 687. The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

If an applicant satisfies the first prong, he must then prove that counsel's deficient

performance prejudiced him 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

A. *Counsel's performance in not calling Davenport did not fall below an objective standard of reasonableness*

The record supports the PCR judge's finding that Counsel's decision not to call Davenport as a witness was reasonable, and therefore, did not fall below an objective standard of reasonableness.

Kennedy Smith, the victim's father, was in the car with the victim when he was shot. (App. p. 738, lines 13-25). Smith later identified Petitioner in a photographic line-up as the person who shot the victim. (App. p. 738, line 20-p. 739, line 1). Further, the testimony of several other witnesses placed Petitioner at the scene. Reginald Wescott testified he saw Petitioner standing close to the passenger side of the car before and after he heard the gunshots. (App. pp. 253-58). Michael Quarles testified he saw Petitioner walk up to the car victim was in and then heard gunshots. (App. pp. 287-89). Myhesha Wine testified he heard Petitioner talking about robbing someone earlier on the day of the incident, (App. p. 328, lines 1-3), and testified he saw Petitioner shoot the victim. (App. p. 336). Carlos Jones testified Wine handed Petitioner a gun, Petitioner walked up to the car with the gun behind his back to the passenger side of the car and then shot the victim. (App. pp. 392-94). Petitioner's cell phone was also found in the vehicle with the deceased victim. (App. pp. 515, lines 7-14; App. p. 738, lines 20-21).

A DVD of Smith and the victim was entered at trial which showed them leaving a convenience store in West Ashley at approximately 4:37PM. (App. p. 156). The shooting was called in with the City of Charleston Police Department at 4:48PM (App. p. 501, line 25-p. 502, line 4). Based on that evidence, the shooting occurred sometime between 4:37PM and 4:48PM. At the PCR hearing, Davenport testified that she "picked [Petitioner] up before, like, before 5, 5:30[,]" and that she did not "remember the actual time, but it was before 5, 5:30[,]" and it "might have been before 5." (App. p. 766, lines 2-7). Davenport testified that from West Ashely, where she picked up Petitioner, to North Charleston, it was about a twenty-five to thirty-minute drive. (App. p. 767, lines 9-20). She testified that she "believed [she] picked him up before 5 or 5:30, because by the time he got to [her] house . . . it was breaking news 5 to 5:30 about a shooting in West Ashley." (App. p. 768, lines 10-16).

At trial, Detective David Osborne testified that during his investigation most of the witnesses were not forthcoming. Specifically, Wescott and Jones (App. p. 507, lines 18-20; App. p. 512, lines 17-25). Detective Osborne also testified that Kennedy Smith was charged with obstruction of justice because he "lied and he did everything he could to impede [their] investigation." (App. p. 487, lines3-11). Osborne also testified that he had not yet determined whether he would charge Myhesa Wine or Cornelius Jenkins in connection with the murder (App. p. 514, lines 13-19). He further testified on cross-examination that, during the course of his investigation, he charged Cornelius Jenkins and Brandon Smalls with obstruction of justice. (App. p. 522, line 20). Counsel impeached Osborne about how Smith came to identify Petitioner as the shooter. (App. pp. 514-19). She questioned him about the description that Smith had given and pointed out that Petitioner was 6'5" tall and that Smith had identified the shooter as a black

male of average height with twists in his hair. (App. pp. 519-29). Osborne also affirmed that Smith later identified the shooter has having "low cut hair." (App. p. 537, line 25-p. 538,line 2). In response to Counsel's questioning on cross-examination, Osborne admitted that he spoke with Carlos Jones, Michael Quarles, and Reginald Westcott, and that they each gave multiple stores with significant differences. (App. p. 529, lines 7-20). He also agreed he could have charged them with obstruction of justice. (App. p. 529, lines 21-25).

At the evidentiary hearing, Counsel testified generally that she decided not to call any witnesses in Petitioner's defense because she did not feel they had any witnesses who would be helpful enough. (App. p. 742). She testified she attacked the credibility of each State's witness. (App. p. 742). She testified that none of the family members the defense interviewed "were solid enough to clear [Petitioner]" and that "since they were family members, there was some bias." (App. p. 742). She testified they made the decision not to put up a case, to preserve final argument. (App. p. 742). Counsel testified that her investigator spoke with Davenport, (App. p. 743, lines 23-25), but she did not provide any information that would have been helpful to Petitioner or his defense. (App. p. 744, lines 10-13). Rather, Counsel testified to the following:

> It was my understanding from the beginning that [Petitioner] . . . told the police that he was outside during the time at his uncle's house and heard the shooting. And then afterwards, his cousin, [Davenport], picked him up and took him to North Charleston. So it was my understanding at the time that she picked him up after the fact and *wasn't a direct witness to anything involving the shooting or his whereabouts during the shooting.*

(App. p. 744, lines 13-22) (emphasis added). Counsel also testified that even though Davenport "mentioned 4:30," which would have been eighteen minutes before the shooting was called in, it was never her understanding that she picked him up before the shooting. (App. p. 745, lines 14-

25). Counsel expressed concern about Davenport's recollection and ability to present a viable alibi. Specifically, she stated,

> When I got that statement, it was more than a year later. So I can't even remember if I considered that to be an issue or not. I don't know over a year later if she would have known the exact time. But, yes, *if she had been 100 percent sure*, then, yes, that would have been important.

(App. p. 745, line 24-p. 746 line 5) (emphasis added).

In reviewing the PCR judge's decision, this Court must give deference to her credibility findings. See Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Counsel has "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). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland v. Washington, 466 U.S. 668, 691 (1984). Thus, where counsel articulates a valid reason for employing a certain strategy, such conduct does not constitute ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions[.]" Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011).

Here, the record reflects Counsel conducted an appropriate investigation, including interviewing relevant witnesses, e.g., Davenport, to determine whether their testimony would be useful at trial. Counsel decided not to call witnesses because she felt the State's witnesses were incredible and that Petitioner's family members could not provide helpful testimony because they

could not exonerate Petitioner and they were biased. The PCR judge found Counsel credible and Davenport incredible. While Petitioner argues Counsel could have presented Davenport as an alibi witness, Counsel testified she did not feel Davenport would have assisted Petitioner's case. Counsel also testified that the State's witnesses were not credible and she extensively cross-examined them. She also cross-examined Detective Osborne to bring out their credibility issues. The PCR judge agreed with Counsel's assessment that Davenport's testimony would not have benefited Petitioner at trial. (App. p. 785). In support of that conclusion, the PCR judge stated that you should "only call an alibi witness when you are 100 percent sure in terms of time frames" because otherwise, it provides "the State an incredible opportunity to impeach [the] witness's credibility." (App. p. 785).

The testimony of multiple independent witnesses in addition to the victim's father placed Petitioner at the crime scene. Moreover, Davenport testified at the PCR hearing that she picked Petitioner up that day at "like, before 5, 5:30." (App. p. 766). Davenport's testimony did not constitute evidence that Petitioner was at another place at the time of the crime and *could not* have committed the crime. State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984). The PCR judge correctly observed that the more likely result of the Davenport's testimony would have been to further incriminate Petitioner by establishing evidence of flight. (App. p. 802). Therefore, not only was it reasonable under Strickland for Counsel not to call Davenport as a witness, it was also a valid trial strategy based on Counsel's testimony that in her judgment in light of her investigation, Davenport would not have provided an alibi defense. Therefore, the record contains ample evidence supporting the PCR judge's finding that Counsel was not deficient for not presenting Davenport as a witness.

B. *Regardless of the alleged deficiency, there is no reasonable probability that but for the failure to call Davenport, the result of trial would have been different*

The record also supports the PCR judge's finding that Petitioner failed to establish prejudice. The PCR judge set forth her findings on the record following the evidentiary hearing. The PCR judge stated that after reviewing the record and the testimony, Davenport's testimony would more likely have established flight, not an alibi, because it put[] [Petitioner] in too-close proximity to the event. It looks like he was fleeing the area and . . . it would have been significantly prejudicial to him." (App. p. 785).

The PCR judge correctly found Petitioner failed to establish a valid alibi defense. "To establish an alibi defense . . . 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)) (emphasis added). A defendant "must show that he was at another specified place at the time the crime was committed, thus making it *impossible* for him to have been at the scene of the crime." Robbins, 275 S.C. at 375, 271 S.E.2d at 320 (emphasis added). "[Because] 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." Id.

Here, Davenport's testimony was equivocal as to what time she picked up Petitioner, and it does not establish that Petitioner *could not have been present* at the time the shooting occurred. Davenport's testimony left open the *possibility* for Petitioner to be guilty, and as a result, in light of the remainder of the evidence presented at trial, her testimony was insufficient to establish an

alibi defense. Given that Davenport could not testify that it was impossible for Petitioner to have been present at the crime scene, had Counsel called Davenport, not only would Petitioner not have been entitled to an alibi instruction, she might have actually harmed Petitioner's defense. Accordingly, the record supports the PCR judge's finding that Davenport's testimony did not establish an alibi defense, and therefore, Petitioner failed to establish that the result of trial would have been different had she been presented as a witness.

The PCR judge also found that Petitioner could not establish prejudice in light of overwhelming evidence from which a jury could have reasonably deduced he committed the crime. (App. p. 789, lines 20-25, p. 803). Specifically, the PCR judge found that "five witnesses testified that [Petitioner] was the instigator of the shooting," pointed the gun at and shot the victim multiple times. (App. p. 803). The PCR judge found that it was the defense's strategy that Petitioner was not there. (App. p. 787, lines 22-24). She further stated in making her ruling on the record that she had not "heard any testimony that would have risen to the level of exculpating [Petitioner], nor any compelling reason for her to have called any of those witnesses strategically to lose ground in the case procedurally." (App. p. 789, lines 15-19). Based on the facts presented above, the record contains ample evidence or probative value to support the PCR judge's finding of overwhelming evidence. Therefore, the PCR judge correctly found Petitioner failed to establish prejudice resulting from Counsel's alleged deficiency. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) cert. denied, 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Accordingly, the record supports the PCR court's finding that Davenport's testimony was not sufficient evidence to establish

deficiency or prejudice resulting from Counsel's decision not to call her as an alibi witness. Therefore, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's denial of post-conviction relief.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR judge's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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March 29, 2017

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Lower Court Case No. 2014-CP-10-05219

FREDERICK FLOWERS, #352185,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

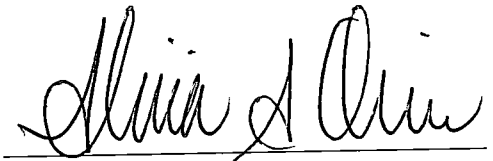
RESPONDENT.

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:

Kathrine Hudgins, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 29th day of March, 2017.



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