

STATE OF SOUTH CAROLINA

ORIGINAL 

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable R. Knox McMahon, Circuit Court Judge

RECEIVED

MAY 01 2017

KINJTA KADEEM SADLER,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001716

JOHNSON PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to call a potential alibi witnesses at Petitioner's trial when the only evidence placing Petitioner at the scene of the shooting was the testimony of a former co-defendant turned State's evidence?

STATEMENT

In the early morning hours of July 17, 2011, a series of fights broke out at the Red Plant Nightclub in Greenville. App. 135, l. 5 – 139, l. 16. As people were leaving the nightclub, Michael Williams and several friends approached Vincent Fant in the nightclub's parking lot. *Id.* Williams was upset that Fant had spoken with a female friend of his. *Id.*

As Williams and Fant began to fight someone shot Fant from behind. The fight between Williams and Fant lasted for only a few seconds. *Id.* After the shots were fired, Fant blacked out and Williams fled. Fant did not see the shooter. *Id.* Only one of Fant's friends saw the shooter, who he described as a black male with short dreadlocks. App. 152, l. 11-21. Fant was taken to a nearby hospital.

Friends from his rap group, the "Hardliners," who were with Fant at the Red Planet followed him to the hospital. App. 153, l. 20 – 162, l. 18. After checking on Fant at the hospital a large group of Hardliners met at the Li'l Cricket gas station on White Horse Road, also in Greenville. *Id.*

This was a common hangout spot for the Hardliners. Approximately ten to fifteen minutes after the Hardliners reached the gas station, an unknown number of assailants opened fire on them. *Id.*; *see also* App. 242, l. 1 - 255, l. 11. Seven Hardliners were hit by the gun fire. None were killed.

The State arrested eight people for the shooting and theorized that the shooting was revenge for the fight earlier that evening at the Red Planet. App. 110, l. 11 – 116, l. 17. Three of those arrested, including Michael Williams, stood trial with Petitioner. The State alleged that the four devised a plan to park behind the gas station and to get out on foot with weapons and open fire on the Hardliners. App. 110, l. 19 – 111, l. 6.

Each defendant was charged with seven counts of attempted murder, possession of a weapon during the commission of a violent crime, conspiracy, and assault and battery by a mob in the second degree. App. 847 - 860.

Trial proceeded from January 7, 2013, to January 12, 2013, before the Honorable Edward W. Miller and a jury. Thomas Quinn represented Petitioner. Katrina Salisbury was the assistant solicitor representing the State.

None of the victims in this case could identify their attackers because their faces were covered. App. 190, l. 14 – 197, l. 5. Larry Johnson, a former co-defendant, testified for the State. App. 660, l. 2 – 670, l. 22. He implicated Petitioner and the three other co-defendants who were on trial. *Id.* Johnson was the only witness to directly testify to Petitioner's involvement.

The jury returned a not guilty verdict on conspiracy, possession of a weapon during the commission of a violent crime, and assault and battery by a mob in the second degree for appellant. They did, however, find appellant guilty on all seven counts of attempted murder. App. 785, ll. 14 – 23. Twenty years' sentences were imposed on the attempted murder charges.

On appeal Petitioner was represented by Robert Pachak. An *Anders* brief was filed on Petitioner's behalf. On January 14, 2015, the Court of Appeals dismissed Petitioner's appeal. *State v. Sadler*, Op. Np. 2015-UP-013 (S.C. Ct. App. filed January 14, 2015).

PCR Application and Evidentiary

On April 29, 2015, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel for failing to call an alibi witness. App. 797 - 803. On December 4, 2015, the State filed a Return. App. 804 – 808.

On April 22, 2016, an evidentiary hearing was held before the Honorable R. Knox McMahon. App. 809 – 835. Mills Ariail represented Petitioner. Assistant Attorney General Patrick Schmeckpeper represented the State. Petitioner and trial counsel both testified.

Petitioner testified that trial counsel assured him the State had a weak case. App. 815, l. 6 – 819, l. 11. Petitioner recalled that the only evidence connecting him to the shooting was the testimony of former co-defendant Larry Johnson and a video tape showing Petitioner at a Waffle House with the other suspects at some point on the night of the shooting. The video had no time stamp. *Id.*

Petitioner stated that counsel did not want to use an alibi witness because it would have meant giving up last argument. “[H]e told me don’t put [witnesses] up. He wanted last argument of the case and be ready to go home.” App. 819, ll. 12-16.

Defense counsel agreed that the State’s case against Petitioner was weak. He adopted a trial strategy that emphasized that “there was not sufficient evidence that placed [Petitioner] at the scene.” App. 829, l. 3-20. Defense counsel admitted that he did not investigate when during the night of the shooting Petitioner visited the Waffle House. App. 830, l. 7 – 831, l. 10.

Defense counsel decided not to call any alibi witnesses because “we thought putting up an alibi would be putting all our eggs in one basket. If [the jury] didn’t believe the alibi, they were going to convict him of everything. So at that point, for strategic purposes, we did not put the alibi up.” App. 831, ll. 6-10.

Order of Dismissal

On July 29, 2016, the PCR court issued an Order of Dismissal denying Petitioner’s application for relief. App. 840 – 846. The court concluded that counsel was not ineffective for failing to call an alibi witness. App. 843 – 844. Specifically, the Court concluded that defense

counsel's focus on the limited amount of evidence placing Petitioner at the scene of the shooting was not objectively unreasonable. App. 844.

The court found counsel's testimony credible and that counsel had a valid concern that putting forward an alibi witness would result in the verdict turning solely on whether or not jurors believed the witness. Finally, the court noted that Petitioner failed to produce the testimony of any alibi witnesses at the PCR evidentiary hearing. *Id.*

This appeal follows.

ARGUMENT

The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to call a potential alibi witnesses at Petitioner's trial when the only evidence placing Petitioner at the scene of the shooting was the testimony of a former co-defendant turned state's evidence.

Defense counsel rendered ineffective assistance of counsel because his professed trial strategy was not objectively reasonable in light of his failure to call an alibi witness, who would have testified about Petitioner's whereabouts at the time of shooting. App. 844 – 846. Given that none of the shooting victims placed Petitioner at the scene, an alibi witness would have significantly undermined the self-serving, incredulous claims of Johnson, the former co-defendant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Where ineffective assistance of counsel is alleged 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*, 466 U.S. at 692; *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. *Bulter*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625 (*citing Strickland*, 466 U.S. 668). 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."

Id. at 117-118, 386 S.E.2d at 625. Specifically, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

In this case, trial counsel’s performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Counsel candidly admitted that there was very little evidence connecting Petitioner to the shooting. Counsel further conceded that he never bothered to speak with any of the people that Petitioner stated he was with at the time of the shooting. App. 830, l. 7 – 831, l. 10.

Counsel did not have a valid strategic reason for failing to call an alibi witness. *See Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (not objectively reasonable given the defense theory of the case for counsel not to call witnesses that were critical to the defense); *see also Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995).

Accordingly, the PCR court erred in finding that counsel’s performance was not deficient because counsel was unable to demonstrate how his professed trial strategy was objectively reasonable “under prevailing professional norms.” *See Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064-2065; *Cherry*, 300 S.C. 115, 386 S.E.2d 624.

Prejudice


Petitioner was prejudiced by defense counsel’s failure to call an alibi witness for two reasons. First, the failure to call an alibi witness robbed Petitioner of crucial testimony that would have contradicted the claims made his former co-defendant Larry Johnson. App. 660, l. 2 – 670, l. 22.

Second, counsel's failure to present an alibi witness prevented the defense from taking full advantage of the Waffle House video. Even if the alibi witness was not completely credible, the witness' testimony would have helped differentiate Petitioner from his co-defendants. Under these circumstances such testimony would have very likely changed the outcome of Petitioner's trial. App. 844 - 845; *see Bannister v. State*, 509 S.E.2d 807, 809 (S.C. 1998) ("PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony . . . in order to establish prejudice from the witness' failure to testify").

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 844; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *see Strickland*, 466 U.S. 668.

CONCLUSION

For the foregoing reason, this Court should grant the petition with the ultimate relief of a new trial for Kinjta Kadeem Sadler.

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2017.

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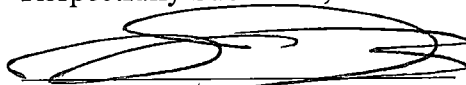
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kinjta Kadeem Sadler states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's trial before Judge R. Knox McMahon, which was held on April 22, 2016 (PCR hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Kinjta Kadeem Sadler.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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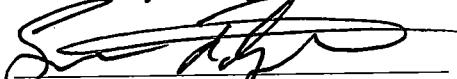
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Kinjta Kadeem Sadler, #353966, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 1st day of May, 2017.


John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of May, 2017.



Notary Public for South Carolina
My Commission Expires: 10/30/2022