

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Sumter County

Honorable Jocelyn J. Newman, Circuit Court Judge

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SEP 01 2017

JOSEPH WADELL DUNBAR, JR.,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000019

JOHNSON PETITION FOR WRIT OF CERTIORARI

Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where he failed to call Petitioner's three alibi witnesses to testify at trial?

STATEMENT OF THE CASE

On May 20, 2010, the Sumter County Grand Jury returned a two-count indictment against Petitioner Joseph Dunbar for second degree burglary and armed robbery. App. 496.

On November 7-9, 2011, Dunbar appeared for trial before the Honorable W. Jeffrey Young and a jury. Dunbar was represented by Willie Brunson, and the State was represented by assistant solicitor Kirk Griffin. App. 1; App. 14; App. 340. The jury returned verdicts of guilty on both counts. App. 328 – 329. Judge Young sentenced Dunbar to concurrent terms of thirty years for armed robbery and fifteen years for second degree burglary. App. 337.

Appellate defender Kathrine Hudgins represented Dunbar on direct appeal. She perfected the appeal with the filing of an Anders brief. App. 352. Dunbar filed a *pro se* response on September 24, 2013. App. 365. On October 8, 2014, the Court of Appeals issued an unpublished opinion dismissing the appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). App. 393. The remittitur was filed on October 24, 2014. App. 395.

On November 5, 2014, Dunbar filed an application for post-conviction relief (“PCR”). App. 397. The State filed its return on January 23, 2015. App. 404. An evidentiary hearing was held before the Honorable Jocelyn Newman on July 26 and 28, 2016. App. 410. Dunbar was represented by Lance Boozer, and the State was represented by assistant attorney general Julie Coleman. App. 410. The court heard testimony from Dunbar, his father Joseph Dunbar, Sr., his stepmother Cristaline West-Dunbar, his grandmother Gertrude Dunbar Cooper, and trial counsel Willie Brunson. App. 414 – 481. The record was left open for the State to perform criminal record checks on Bluford’s witnesses to discern any impeachable offenses. App. 482 – 484.

On December 30, 2016, Judge Newman filed an Order of Dismissal denying the application for post-conviction relief. App. 486. This appeal follows.

ARGUMENT

The PCR court erred in finding that trial counsel provided effective assistance of counsel where he failed to call Petitioner's three alibi witnesses to testify at trial.

Relevant Facts

Petitioner Dunbar was accused of participating in the armed robbery of a hair salon in Sumter, South Carolina on January 1, 2010. App. 496; App. 417, l. 19 – 418, l. 2. Dunbar was arrested in Palm Beach, Florida on January 7, 2010. App. 418, ll. 3-10. At the PCR hearing, Dunbar explained that in his meetings with retained counsel, Willie Brunson, they discussed the alibis for the six separate armed robberies with which Dunbar had been charged. App. 416, ll. 2-6; App. 417, ll. 5-18. Regarding his alibi for the January 1st offense, Dunbar told Brunson: “I was in Florida with my family; I wasn’t even in the state.” App. 418, ll. 11-17. Specifically, at 7:00 p.m. that day, Dunbar was at a pool party in Boynton Beach, Florida, having moved back to the area to live with his father in early December. App. 418, l. 18 – 419, l. 17.

Brunson told Dunbar that he would pursue the alibi defense, and Dunbar believed that Brunson filed the requisite notice of alibi. App. 420, ll. 3-8. Dunbar further testified that he mailed Brunson a letter from the county jail with a list of names of alibi witnesses who could confirm that Dunbar was in Florida and that the men discussed the list at Brunson’s office after Dunbar was released on bond. These witnesses included: Dunbar’s father, Joseph Dunbar, Sr.; Dunbar’s now stepmother, Cristal West, and Dunbar’s grandmother, Gertrude Dunbar. App. 420, l. 9 – 421, l. 20. No alibi witnesses were called to testify at Dunbar’s trial. Dunbar asked Brunson why the witnesses were not present, but was never given an explanation. App. 424, l. 14 – 425, l. 6. Dunbar further noted that his witnesses were present and willing to testify the first two times that his case was called for trial and continued, but they were not notified of the

November 7th trial date. App. 425, l. 7 – 429, l. 6; App. 443, l. 25 – 447, l. 8; App. 455, l. 21 – 458, l. 12; App. 465, l. 20 – 468, l. 3.

Dunbar testified that when he woke up on January 1st, he and his father went over to the home of some friends named Lisa and Margarita, where they stayed until approximately 12:30 p.m. App. 421, l. 21 – 422, l. 9. They returned home, where Dunbar played a game with his brother before walking to see his grandmother, Gertrude Dunbar, who lived in a nearby apartment. App. 422, ll. 9-20. After eating at her apartment, Dunbar went to a pool party that was being held in the apartment complex at approximately 4:00 or 4:30 p.m. App. 422, l. 20 – 423, l. 4. He did not leave the pool to return home to his father's apartment until after dark. App. 423, l. 5 – 424, l. 1.

Joseph Dunbar, Sr., Christaline West-Dunbar, and Gertrude Dunbar were all called as witnesses at the PCR hearing and testified consistently with Dunbar's testimony. Dunbar's father estimated that the drive from Boynton Beach to Sumter is approximately ten hours. App. 437, ll. 10-25. Dunbar Sr. said that his son came to live with him in Florida on December 5 or 6, 2015. App. 438, l. 14 – 439, l. 4. On January 1st, the father and son went to see Dunbar's Uncle Harold, Harold's girlfriend Margarite, and Lisa. After they come home, people were preparing for the pool party, which is where Dunbar, Dunbar Sr., and several other family members were at 7:00 p.m. App. 439, l. 5 – 441, l. 17.

Christaline West-Dunbar, Dunbar Sr.'s wife, also testified that Dunbar came to live with them in Florida in early December 2009. App. 449, l. 21 – 450, l. 25. Dunbar Sr. and Dunbar were not home when Christaline woke up on January 1st. She first saw them at approximately 2:30 or 3:00 p.m., as she and her mother-in-law were cooking in the kitchen. They all went to the pool in the afternoon and stayed until 9:00 or 10:00 p.m. 451, l. 17 – 455, l. 2.

Gertrude Dunbar, Dunbar's grandmother, likewise recalled that Dunbar was living with his father on January 1, 2010, having moved to the area during the first week of December. App. 460, l. 17 – 463, l. 1. On the morning of January 1st, Gertrude saw Dunbar sleeping in the living room when she went by to drop a few things off at Dunbar Sr.'s apartment. App. 463, ll. 2-20. She did some cleaning and cooking to prepare for the New Year's dinner, watched television, and went out to the pool between 4:00 and 5:00 p.m. App. 463, l. 23 – 464, l. 7. Gertrude saw Dunbar at the pool party until she left, at approximately 7:00 or 7:30 p.m. App. 464, ll. 8-19. He stopped by Gertrude's apartment briefly that night to get some food and then left. App. 464, l. 20 – 465, l. 6.

Trial counsel Willie Brunson claimed that Dunbar never told him that he was in Florida on the day of the crime. Brunson filed a notice of alibi defense, but said that the alibi discussed with Dunbar was that Dunbar was with his children at home in Sumter on the date of the incident. He claimed that the names given to him as witnesses were Dexter Dunbar and Janice Dunbar, but that "the timeframes didn't add up" so they decided to abandon the alibi defense. App. 472, l. 11 – 473, l. 24. Brunson said that had Dunbar or his family members mentioned that Dunbar was in Florida on the date of the crime, it "would have been a fantastic defense" and he would have called them as witnesses. App. 473, l. 25 – 474, l. 10; App. 476, ll. 11-20. On cross-examination, Brunson denied that the alibi for which Dexter Dunbar and Janice Dunbar were witnesses related to another one of Dunbar's pending charges. App. 479, l. 23 – 480, l. 8. He also denied receiving any letter from Dunbar related to his Florida alibi and the witnesses who testified at the PCR hearing. App. 480, l. 25 – 481, l. 12.

In the Order of Dismissal, the PCR judge ruled that neither Dunbar nor his alibi witnesses were credible and found trial counsel's testimony "to be credible and persuasive." App. 488;

App. 493. As a result, she ruled that “their testimony would not have changed the outcome of the trial.” App. 493. Rather, the court found that trial counsel was told about a different alibi for the date of the incident, such that he was not ineffective in failing to investigate the alibi witnesses presented at the PCR hearing. App. 493. Dunbar’s application was accordingly denied. App. 495.

Discussion

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance “fell below an objective standard of reasonableness.” Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). “To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.” Id. at 571, 552 S.E.2d at 723.

The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). The PCR court's findings on matters of credibility are given great deference by this Court. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Even so, there must be probative evidence to support the PCR judge’s findings. Id. at 271, 701 S.E.2d at 740.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Id.

In the present case, Dunbar testified that he provided a list of the names of the alibi witnesses related to the January 1st incident to trial counsel in a letter, thereby creating a duty for trial counsel to investigate the witnesses. App. 420, l. 9 – 421, l. 20. The alibi witnesses were called and testified consistently at the PCR hearing that it was impossible for Dunbar to have committed the January 1st robbery in Sumter because he was with them in Florida all day. See State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) (since 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). The logical explanation for the certainty expressed by the alibi witnesses at the PCR hearing and trial counsel's averment that Dunbar told him a different alibi, was that trial counsel had confused the January 1st case with one of the other five armed robberies with which Dunbar was charged. Thus, this was not a matter of a lack of credibility on the part of Dunbar or his witnesses. Dunbar is accordingly entitled to a new trial where he can present his alibi defense.

CONCLUSION

Based on the foregoing, Petitioner Joseph Dunbar respectfully requests that this Court grant his petition for writ of certiorari and order further briefing on the issue raised herein.

A handwritten signature in cursive script, reading "Laura R. Baer", is written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of September, 2017.

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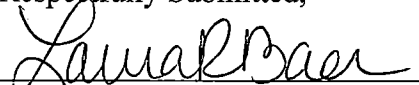
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph Wadell Dunbar states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Jocelyn J. Newman, which was held on July 26, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Joseph Wadell Dunbar.

Respectfully Submitted,



Laura R. Baer

Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of September, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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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 Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Joseph Wadell Dunbar, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of September, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

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

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027