

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ANTHONY MARQUISE MARTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002458

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

ORIGINAL
RECEIVED
JAN 26 2010
S.C. SUPREME COURT

INDEX

INDEX..... i

ARGUMENT.....1

Petitioner’s first issue, related to the counsel’s ineffectiveness in his examination
of alibi witness Fumbah, is properly preserved for appellate review.

CONCLUSION.....5

ARGUMENT

Petitioner's first issue, related to the counsel's ineffectiveness in his examination of alibi witness Fumbah, is properly preserved for appellate review.

The first issue raised in the petition for writ of certiorari was:

Whether the PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where during the examination of Petitioner's mother, Alba Fumbah, they failed to elicit the specific time that she dropped Petitioner off in the Atlanta area on the day of the bank robbery in North Augusta, without which her testimony did not constitute a true alibi?

Pet. for Cert., p. 1. Respondent contends that Petitioner's orally amended allegation — that trial counsel failed to put forth an alibi defense as it relates to actual witnesses that were called on Martin's behalf — was not ruled upon in the Order of Dismissal. See State's Return, pp. 13 – 14; App. 470, l. 14 – 471, l. 24. Respondent maintains that a motion to alter or amend pursuant to Rule 59(e), SCRPC, requesting a more specific ruling on the failure to elicit specific timeline testimony from Alba Fumbah, was necessary to preserve the issue for appellate review.¹ State's Return, p. 14.

Respondent admits that the PCR hearing testimony regarding the deficiencies in Fumbah's examination was summarized in the Order of Dismissal. State's Return, p. 14; see App. 520 – 521. Moreover, the first sentence of the text immediately below the heading "failure

¹ Respondent also argues that the PCR court properly denied relief because there was overwhelming evidence of Martin's guilt. State's Return, pp. 14-17. While the flaws in the Court of Appeals' and PCR court's overwhelming evidence analysis is more fully discussed in the petition for certiorari, Martin notes that Respondent's characterization of several other witnesses as "disinterested" is inaccurate, as they were actually blood relatives of co-defendant Quinton Harmon. Kenyon and Jasmine Harmon were Harmon's siblings, and Tyewan Johnson and Jacob McKie were Harmon's cousin. App. 177 – 199. Notably, it was Quinton Harmon who was caught on surveillance footage inside of the bank just minutes before the robbery. App. 210, l. 11 – 211, l. 16. Harmon's only hope of lessening his own culpability was to point the finger at someone else — Martin.

to call alibi witness” was: “Applicant has failed to meet his burden in proving that Trial Counsel was ineffective for failing to call additional alibi witnesses **or for failing to examine them correctly at trial.**” App. 525 (emphasis added). While headings are a useful organizational tool, it is the substantive ruling contained within the text of the Order that must be reviewed to determine issue preservation. See S.C. Code Ann. § 17-27-80 (“The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.”). The paragraph went on to find that “Applicant failed to present testimony from any alibi witnesses at the evidentiary hearing, and thus cannot establish prejudice because their testimony is merely speculative” and quote Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538,540 (1995). App. 525.

In Marlar v. State, this Court reminded the bench and bar: “[C]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it.” 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (quoting Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d, 127, 128). “Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend *if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP.*” Id. (emphasis added).

Unlike the present case, the PCR court in Marlar failed to specifically address any of the allegations raised by the applicant. 375 S.C. at 408, 653 S.E.2d at 266. Rather, the order provided that Marlar’s counsel rendered “reasonably effective assistance under the prevailing professional norms and demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law.” Marlar v. State, 373 S.C.

275, 278, 644 S.E.2d 769, 771 (Ct. App. 2007), rev'd by, 375 S.C. 407, 653 S.E.2d 266 (2007). It also included the following general ruling: “As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them.” Id. at 278-79, 644 S.E.2d at 771. While the Order of Dismissal in the present case contained an “all other allegations” paragraph similar to the one in Marlar, this is not the portion of the Order relied upon for the ruling on the alibi related allegations. See App. 527. The substantive paragraph, specifically finding that Martin failed to prove that trial counsel was ineffective for failing to examine the alibi witnesses correctly at trial because he could not prove prejudice, was sufficient to preserve this issue for appellate review. See App. 525.

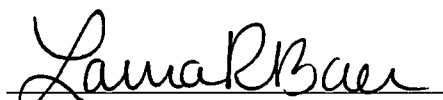
In Strickland v. Washington, the Court made clear that “[a] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” 466 U.S. 668, 697 (1984). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice... that course should be followed.” Id. at 697. As such, it is not unusual for a PCR court to deny an allegation based solely upon prejudice without a discussion of deficiency.

Here, witness Fumbah did not testify at the PCR hearing. Rather, the PCR court was presented with her trial testimony, Martin’s PCR testimony, and trial counsel David Hayes’ PCR testimony. App. 243 – 246; App. 284, l. 18 – 285, l. 9; App. 482, l. 13 – 485, l. 16; App. 498, l. 3 – 504, l. 4. Hayes’ recollection was refreshed with the witness statement taken by his office from Fumbah, in which she indicated that she dropped Martin off in Atlanta at “around 11:15, 11:30” on the day of the North Augusta bank robbery. App. 501, l. 10 – 502, l. 19. Thus, while

the PCR court erred in its analysis that proof of prejudice required Fumbah's testimony at the PCR hearing, as argued more fully in the petition for certiorari, it was not unreasonable for PCR counsel to conclude that the PCR court's reason for the denial of all allegations related to alibi was the failure to call anyone other than the applicant and attorneys as witnesses at the PCR hearing. See App. 525. This especially so since the preceding sentence specifically referenced the failure to examine the alibi witnesses at trial and the deficient examination of Fumbah was the only allegation to which that statement could have possibly referred.² As such, no motion to alter or amend was necessary in this case.

CONCLUSION

Based on the foregoing and the argument contained in the petition for writ of certiorari, Petitioner Anthony Martin respectfully requests that this Court grant certiorari and order further briefing of the issues raised.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2018.

² Martin's grandmother, Dora McKenny, also testified at his trial. She testified that Martin returned to live with his mother in Georgia on April 12, 2009 and that she had not seen him again in Aiken County since then. However, she did not provide an alibi for the day of the bank robbery on April 23, 2009. App. 239, l. 5 – 242, l. 22.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ANTHONY MARQUISE MARTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

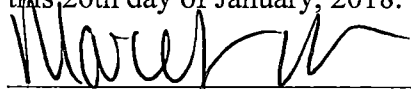
The undersigned hereby certifies that a true copy of the Reply to Return to Petition for Writ of Certiorari in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Anthony Marquise Martin, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 26th day of January, 2018.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027