STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Jocelyn J. Newman, Circuit Court Judge

VICTOR MCCOY WELDON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-0020000

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify?

STATEMENT

Petitioner was indicted for burglary in the first degree, attempted murder, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime by a Clarendon County Grand Jury during its January 2011 term. App. 588 – 589. Petitioner proceeded to a five-day trial on May 14, 2012 before the Honorable Ralph F. Cothran and a jury. App. 1. Ernest A. Finney, III and Jason Corbett appeared on behalf of the State, and John Knobeloch and Laura Knobeloch represented Petitioner.

Petitioner and a co-defendant, Michael Pearson, were tried together following an incident at the home of Edward "Slick" Gibbons on May 15, 2010. App. 83 l. 8 – App. 90 l. 9. Gibbons averred that three masked men attacked him at his home. App. 92 l. 16 – App. 96 l. 17. According to Gibbons, the men attempted to wrap tape around his face and legs. App. 98 l. 22 – App. 99 l. 17. Gibbons' El Camino was allegedly stolen as the men left. App. 102 ll. 4 – 21.

Pearson's fingerprint was reportedly found at Gibbons' garage. App. 219 l. 16 – App. Petitioner's DNA was allegedly located on the tape used to tie up Gibbons. App. 275 ll. 15 – 25. Petitioner did not testify.

At the conclusion of trial, the jury found Petitioner guilty of burglary in the first degree, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime. App. 466 ll. 10 – 21. Judge Cothran sentenced Petitioner to thirty years' imprisonment on the burglary charge, thirty years for the armed robbery charge, five years for the grand larceny, twenty years for the kidnapping charge, and five years on the possession of a weapon charge. App. 475 l. 6 – 25. The burglary and armed robbery sentences were imposed consecutive to one another, with the remaining charges running concurrently. Id.

Petitioner's sentences and convictions were affirmed. On or about January 5, 2016, Petitioner filed an application for post-conviction relief. App. 478. Petitioner's application contained allegations of ineffective assistance of counsel, including the claim that "none of [his] alibi [witnesses] were called to testify." App. 487.

The State made its Return on or about April 11, 2016. App. 493. An evidentiary hearing was conducted on July 27, 2016 before the Honorable Jocelyn Newman. App. 501. In addition to Petitioner and trial counsel, two of Petitioner's alibi witnesses—Debra Weldon and Jessica Weldon—testified at the hearing.

On August 3, 2017, Judge Newman issued her order denying Petitioner relief. App. 569. She ruled that "[t]he decision not to use contradictory alibi witnesses at trial was very likely a part of Trial Counsel's strategy." App. 574. As a result, the PCR court concluded that counsel's performance "cannot be found ineffective," and Petitioner's application was dismissed. App. 576.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify.

Relevant Facts

On the morning of May 15, 2010, Petitioner was at home. App. 509 ll. 4 – 14. He lived with his sister, mother, little brother, and girlfriend. App. 510 ll. 7 – 9. Petitioner informed his attorney that he woke up around 6:40 in the morning on May 15, 2010, and that he spoke with his sister and saw his mother at the house. App. 510 l. 25 – App. 511 l. 16; App. 520 ll. 4 – 19.

In response, counsel indicated that he would file a motion to "call them to the stand to testify" on Petitioner's behalf to disprove the State's assertion that Petitioner was involved in the alleged crime. App. 511 ll. 17 – 23; App. 513 ll. 23 – 25. Petitioner's mother and sister were present at trial but did not testify. App. 511 l. 24 – App. 512 l. 8; App. 513 ll. 13 – 14. It was Petitioner's belief that they would testify, and he became concerned that they did not. App. 512 ll. 11 – 13. Because counsel wished to have the last argument during closing, the witnesses who could have proven that Petitioner was at home during the time of the alleged crime were not called on Petitioner's behalf. App. 512 ll. 22 – 25.

Debra Weldon, Petitioner's mother, was present at her son's trial and was supposed to be a witness. App. 522 l. 16 – App. 523 l. 22. She had gotten off work at 8:30 on the evening of May 14, 2010. App. 524 ll. 2 – 20. She went home, where she saw Petitioner at the house. App.

525 ll. 3 – 24. She recalled going to be around midnight and waking up around 8:00 on the morning of May 15, 2010. App. 526 ll. 2 – 11. Petitioner was home when she went to bed and when she awoke. App. 526 ll. 12 – 13. Petitioner did not have a car, nor did he have access to one. App. 526 l. 19 – App. 527 l. 2. To Mrs. Weldon's knowledge, her son did not leave the house during that span of time. Id. Mrs. Weldon informed trial counsel accordingly. App. 527 ll. 7 – 25. Counsel asked Mrs. Weldon to come to trial and testify. Id. She understood the purpose of her testimony was to "tell whether [Petitioner] was at the house at the time of the crime." Id.

Petitioner's sister, Jessica Weldon, testified similarly. App. 534 l. 16 – App. 537 l. 22. She recalled going to bed around midnight. Id. At that time, Petitioner, his girlfriend, and his mother were also at the house. Id. Petitioner was in a room with his girlfriend. Id. Around 5:00 the next morning, Jessica woke up around and snuck into Petitioner's room for a cigarette. Id. She saw Petitioner in the room, asleep. Id. She testified that Petitioner was at the house from 6:00 to at least 7:00 that morning. Id. She recalled Petitioner opening the door to his room around 9:00 a.m. to let his two cats out. Id.

Much like Mrs. Weldon, Jessica Weldon was prepared and available to testify at Petitioner's trial. App. 537 ll. 6 – 23. The above testimony is what she would have offered, under oath, same as the evidentiary hearing. Jessica was directed to be at her brother's trial by counsel. App. 533 ll. 8 – 15. According to counsel, she was supposed to testify. App. 533 ll. 16 – 17. In fact, she had spoken with counsel regarding her testimony. App. 533 ll. 23 – 25. However, much like Petitioner and his mother, and contrary to her intentions, she did not end up testifying. App. 534 ll. 9 – 15.

The following exchange took place during the evidentiary hearing between Petitioner and his PCR counsel:

> Q: Okay. Without you testifying and without your sister and your mother testifying, was there any other way for the jury to hear where you were that day?
>
> A: No, sir.
>
> Q: Do you think that prejudiced your trial?
>
> A: I do.

App. 513 ll. 17 – 22.

Petitioner was arrested on July 20, 2010. App. 507 ll. 20 – 24. Counsel began representing Petitioner later that year, around October 2010. App. 507 l. 25 – App. 508 l. 3. During the entirety of trial counsel's representation, from October 2010 until Petitioner's trial in May 2012, Petitioner only met with him four times. App. 508 ll. 4 – 8.

Counsel recalled meeting with Petitioner "at least twice" during his year-and-a-half representation. App. 540 ll. 1 – 7. Counsel characterized the State's case against Petitioner as weak: "I recall after receiving the discovery that I reached out to the … assistant solicitor with no tongue-in-cheek thinking that I had received the wrong discovery package because [Petitioner was] not mentioned in it." App. 541 ll. 3 – 8. The only piece of evidence which allegedly linked Petitioner to the crime was DNA on the duct tape. App. 541 ll. 9 – 17. Counsel explained his trial strategy:

> [T]he trial strategy was to attack the DNA, which was the only evidence linking Mr. Weldon to the crime. There were no witnesses. All of the defendants were wearing masks. There was, there was nothing linking him except for the DNA. And I guess the - - our, our theory on weakness of the DNA evidence was that the police officers did take a sample from both the outside of the duct tape and the sticky side of the duct tape, the significance being that if, you know, the DNA is found on the sticky side, it's much more likely that you were present because you had to expose the sticky side … when the sample, DNA sample was put on it,

even though the police officers took samples of both sides, they didn't label them. So they were unable to say whether the, whether the DNA sample came from the outside or the sticky side of the duct tape.

App. 542 l. 13 – App. 543 l. 3.

Counsel was present at the evidentiary hearing while Petitioner's mother and sister testified. App. 544 ll. 2 – 24. He recalled speaking with both of them in advance of Petitioner's trial and had notes which reflected such. Id. He agreed that their testimony at trial would have been "very similar to the testimony that they gave" at the evidentiary hearing. Id. Such a conclusion notwithstanding, he did not call any witnesses on Petitioner's behalf.

When asked why none were called, counsel could not articulate a reason:

I do not know. The - - we did file a notice of alibi and I did prepare- - in the trial notebook there is a spot where I had prepared to ask Debra, at least the mother, Debra Weldon, questions supporting the alibi. Possibly we did not call a witness so that we could have final argument, but so honestly I, **I don't know why we would not have called them as alibi witnesses**.

App. 545 ll. 3 – 11. (emphasis added).

The following exchange then took place between PCR counsel and trial counsel:

Q: All right. Had you present - - was there any other way if Mr. Weldon didn't testify and Ms. Jessica Weldon didn't testify and Debra Weldon didn't testify, was there any other way to convey that to the jury?

A: No.

Q: Do you think that that was important testimony for the jury to consider?

A: I do.

Q: Okay. Looking back, should you have called them as witnesses in the trial?

A: I believe so, yes.

Q: And do you think that that could have changed the outcome of Mr. Weldon's trial?

A: I do.

App. 546 ll. 2 – 15.

Furthermore, trial counsel questioned his own claim that he might have decided not to call these alibi witnesses in order to receive the last argument. App. 547 ll. 9 – 17. Not only was he "scratching [his] head wondering why [he] would not have called [the] alibi witnesses," but he was not even sure if he made the decision not to do so in order to receive last argument. Id. Notably, he agreed that "**calling alibi witnesses would have been a much more favorable strategic discussion versus not calling alibi witnesses and trying to get the last argument**" because there was no other way to present an alibi defense. App. 547 l. 9 – App. 548 l 1. (emphasis added). In hindsight, counsel had "no idea why [he] did not call the alibi witnesses." App. 556 ll. 7 – 16

Discussion

Petitioner was home at the time of the alleged crime, and the two witnesses who could have corroborated his alibi were not called at his trial. Although Petitioner informed his attorney of this, and although the two witnesses were both available and prepared to testify, counsel elected not to put up a defense.

It is well settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness. Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992); see Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994); see also Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding that it "was not objectively reasonable given the defense theory of the case" for counsel not to call witnesses that were critical to his client's defense.).

Accordingly, the PCR Court erred in holding that trial counsel provided effective assistance of counsel because Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts "reweigh the evidence in aggravation against the totality of available mitigating evidence." Id. Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." Id. at 537, 123 S.Ct. 2527 (citation omitted). A "reasonable probability" is less than a preponderance of the evidence but still "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

In this case, Petitioner presented sufficient evidence at the PCR evidentiary hearing to establish that trial counsel should have called the alibi witnesses at his trial. Counsel was aware of the witnesses and had them available at trial. Based on his own admission, he should have called them.

The Order of Dismissal contained a ruling that trial counsel's "decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither

ineffective nor prejudicial." App. 573. In the very next paragraph, the Order reads: "Trial Counsel stated that he could not recall why he did not use their testimony." The PCR Court erred, therefore, in the former conclusion, as trial counsel's testimony did not support such a contention.

Although the Order of Dismissal did not contain a credibility determination, the PCR Court characterized trial counsel's testimony as credible for a separate issue: "Trial Counsel credibly testified that he did not recall Applicant making this request." App. 579. So at least in that capacity, the PCR Court weighed trial counsel's credibility and found him believable.

As referenced above, counsel could not fathom why he did not call the alibi witnesses. He testified that he should have called them as witnesses, and the resulting failure to do so prejudiced Petitioner's case. Furthermore, as someone with a detailed understanding of Petitioner's case, counsel opined that the result in Petitioner's matter would have been different had he called the alibi witnesses.

The Order of Dismissal extends cherrypicked portions of counsel's testimony beyond any logical interpretation. Using language such as "it is reasonable to think that he considered this as part of his strategy" and "[t]he decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's trial strategy" contravenes the very testimony elicited from counsel. The PCR Court somehow transformed an admission of ineffectiveness into a valid trial strategy and thereby reached an incorrect conclusion based upon a lack of evidence.

The Order of Dismissal also seemed to suggest that counsel could only employ a singular overall strategy, which in this instance was to attack the State's DNA evidence: "Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to

attack the State's DNA evidence against [Petitioner]." App. 575. The Order of Dismissal cited Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.E.2d 738 (2010) for the notion that:

> A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce the strategy on the record.

App. 575.

This Court cited to Wood in Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014). In Weik, this Court held that counsel's failure to present readily available social history mitigation evidence was deficient performance, and the defendant suffered prejudice as a result of counsel's deficient performance. Id. This Court found counsel's decision to call only one witness to testify in mitigation "resulted from counsel's inattention, not reasoned strategic judgment." Id. at 236, 761 S.E.2d at 768. Quite importantly, this Court cited Wood, supra, in order to emphasize "the distinction between the issue of whether counsel made a strategic decision in the first place and the issue of whether a strategic decision is a reasonable exercise of professional judgment under Strickland." Id. (citation omitted).

The Order of Dismissal in the matter *sub judice* contained additional flawed conclusions wherein the PCR Court appeared to overlook trial counsel's admission that he failed to call the alibi witnesses and the resulting failure prejudiced Petitioner's case:

> Trial Counsel's testimony at the PCR hearing combined with this actions at trial supported by the trial transcript evidence the fact that Trial Counsel performed above the standard level of competence required by defense counsel.

App. 581.

The PCR Court failed to review counsel's strategy under "an objective standard of reasonableness" as required by Ingle v. State and seemed only concerned with justifying his actions, his own testimony notwithstanding. 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Petitioner only had a juvenile offense on his prior record. App. 474 l. 16 – App. 475 l. 4. He would not have opened the door to a litany of prior offenses if he had taken the stand and testified. Similarly, there was no indication that either his sister or his mother had any convictions which would have subjected them to impeachment. Gibbons, the man who was attacked, was never able to identify the men involved. Petitioner had everything to gain from putting his alibi witnesses on the stand, yet it was not done. The resulting prejudice manifested itself in his convictions and lengthy consecutive sentences. As evidenced by trial counsel's testimony, there was a reasonable probability that the outcome would have been different had he called Petitioner's mother or sister to the stand to corroborate the testimony which would have been offered by Petitioner. Simply put, holding out for the last argument in closing was not a sufficient trial strategy to justify the decision not to put two credible alibi witnesses on the stand.

Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel because there is a reasonable probability that but for trial counsel's deficient performance, Petitioner would have received a fair trial. App. 545 – 547; see Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel where there is a reasonable probability that the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Jocelyn J. Newman, Circuit Court Judge

VICTOR MCCOY WELDON,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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 a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Victor McCoy Weldon, #350911, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of May, 2018.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 23rd day of May, 2018.

ATTORNEY FOR PETITIONER

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022