

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
George C. James Jr., Circuit Court Judge

RECEIVED

DEC 17 2018

S.C. SUPREME COURT

VERNON GOODWIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2018-000968

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General ✓

SAMUEL KEY
Assistant Attorney General
S.C. Bar No. 103206

Post Office Box 11549
Columbia, S.C 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
I. Whether the PCR court properly found trial counsel was not ineffective for failing to argue at the directed verdict stage, or during the charge conference, that a conviction under the theory of accomplice liability requires proof of the defendant's physical presence at the scene of the crime because that is not the law in South Carolina?.....	4
II. Whether the PCR court properly found trial counsel was not ineffective for failing to pursue an alibi defense when trial counsel articulated a reasonable trial strategy?.....	7
CONCLUSION.....	10

STATEMENT OF ISSUES ON APPEAL

- I. Whether the PCR court properly found trial counsel was not ineffective for failing to argue at the directed verdict stage, or during the charge conference, that a conviction under the theory of accomplice liability requires proof of the defendant's physical presence at the scene of the crime because that is not the law in South Carolina?
- II. Whether the PCR court properly found trial counsel was not ineffective for failing to pursue an alibi defense when trial counsel articulated a reasonable trial strategy?

STATEMENT OF THE CASE

Vernon Goodwin was indicted for murder, first-degree burglary, eight counts of kidnapping, two counts of assault and battery with intent to kill (ABWIK), five counts of assault with intent to kill (AWIK), two counts of armed robbery, and two counts of attempted armed robbery. He and his co-defendant were tried before a jury and Judge Howard P. King. He and his co-defendant had different trial counsel.

Goodwin's charges stem from an incident where Calderone and Carlton Bracey (the Bracey brothers) entered a dwelling to rob a drug dealer and committed the offenses for which Goodwin was charged. Goodwin was charged under the theory of accomplice liability. Goodwin was not present at the time the Bracey brothers committed the acts; however, evidence was presented at trial showing Goodwin drove the brothers to the scene, provided them with guns and equipment to carry out the robbery, and was on standby as the getaway driver. It was undisputed at trial, and at the PCR hearing, that Goodwin was not actually present when the crimes were committed. However, the State's theory was that Goodwin was the mastermind of the operation; therefore, he was tried under the theory of accomplice liability.

The jury convicted Goodwin as indicted on all charges except for murder. On the murder charge, the jury found him guilty of the lesser included offense of voluntary manslaughter. The trial court sentenced Goodwin to serve concurrent terms of imprisonment of forty years for first-degree burglary, thirty years for each count of armed robbery, thirty years of each count of kidnapping, thirty years for voluntary manslaughter, twenty years for each attempted armed robbery, twenty years for each ABWIK, and ten years for each AWIK. (App. 727-29). Goodwin filed an initial notice of appeal; however, he subsequently withdrew his appeal. The Court dismissed his direct appeal on May 14, 2013.

Goodwin commenced this action for PCR on October 1, 2013. An evidentiary hearing was convened before Judge George C. James Jr., on April 17, 2015. Goodwin, trial counsel, and Deborah Missouri, Goodwin's mother (Mother), testified at the PCR hearing. The three issues before the PCR court were whether trial counsel was ineffective for: (1) failing to move to quash the indictment based on its lack of reference to the theory of accomplice liability; (2) failing to argue in his directed verdict motion, or during the charge conference, that a conviction under the accomplice liability theory requires proof of the defendant's physical presence; and (3) failing to pursue an alibi defense. (App. 899). After the evidentiary hearing, the PCR court denied relief on January 15, 2018. Goodwin filed a Rule 59(e), SCRE, motion to alter or amend the PCR court's order; thereafter, the PCR court issued an order denying the Rule 59(e) motion.

ARGUMENT

I. **Whether the PCR court properly found trial counsel was not ineffective for failing to argue at the directed verdict stage, or during the charge conference, that a conviction under the theory of accomplice liability requires proof of the defendant's physical presence at the scene of the crime because that is not the law in South Carolina?**

Goodwin argues trial counsel was ineffective for failing to argue either at the directed verdict stage, or during the charge conference, that a conviction under the theory of accomplice liability requires proof of the defendant's physical presence at the scene of the crime. The PCR court found trial counsel was not deficient for failing to make this argument, at either stage, because the suggested argument is not the law in South Carolina. (App. 903–04). The PCR court further found that, even if trial counsel had made the suggested argument, Goodwin was not prejudiced by such alleged deficiency because: (1) the State presented sufficient evidence for the question to be submitted to the jury; and (2) the trial court ruled on the issue. (App. 904–05). The PCR court did not err, and certiorari should be denied.

A conviction under the theory of accomplice liability is appropriate if: (1) there is proof beyond a reasonable doubt that a defendant participated with others in the pursuit of a common design to commit an unlawful act; and (2) the defendant takes the part agreed upon, or assigned to him, in an effort to insure the success of the common undertaking. *State v. Gilbert*, 107 S.C. 443, 93 S.E. 125 (1917); *State v. Thompson*, 374 S.C. 257, 647 S.E.2d 702 (2007); *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766 (2012); *State v. Reid*, 408 S.C. 461, 758 S.E.2d 904 (2015). In such an instance, the defendant is presumed to be present, and is guilty as if physically present. *State v. Chavis*, 277 S.C. 521, 522, 290 S.E.2d 412, 412–13 (1982).

South Carolina courts have held that proof of presence alone is not, by itself, enough evidence for a conviction, and that proof of mere presence and prior knowledge that a crime was going to be committed, without more, is not enough to prove guilt. *State v. Harry*, 420 S.C. 290, 803 S.E.2d 272 (2017). Instead, presence of the defendant at the scene by pre-arrangement to aid,

encourage, or abet in the perpetration of the crime constitutes guilt as a principal. See *Gibson*, 390 S.C. at 354, 701 S.E.2d at 770; see also *State v. Hill*, 268 S.C.390, 395-96, 234 S.E.2d 219, 221 (1977).

As an initial matter, the PCR court found Goodwin was not prejudiced by trial counsel's alleged deficiency—failure to argue against the theory of accomplice liability because Goodwin was not physically present when the crime occurred—because the trial court ruled on the issue. (App. 905). The PCR court's factual finding that the trial court ruled on the issue is supported by the record. (App. 572). Goodwin argues he “was prejudiced by [trial counsel's] substandard performance because, had he made the proper objections, the trial court [] would have entered a verdict of acquittal on his behalf.” (Pet. 11). This argument completely ignores the PCR court's finding that “the trial court *actually ruled* on the issue” (App. 905) (emphasis added). Goodwin fails to address the PCR court's prejudice finding; therefore, certiorari should be denied because Goodwin cannot show he was prejudiced by trial counsel's alleged deficiency.

However, even if the PCR court's above referenced finding was addressed by Goodwin, Goodwin's argument fails on the merits. Goodwin argues he should not have been charged under the theory of accomplice liability because he was not physically present when the crime occurred. He argues that had trial counsel made this argument, the trial court would have been compelled to not give an accomplice liability jury charge. The PCR court found trial counsel was not deficient for failing to make the suggested argument at either the directed verdict, or the charge conference, stage of trial because the suggested argument is not the law in South Carolina. The PCR court held Goodwin's reliance on the above referenced excerpt from *Gibson* is misplaced, as *Gibson* cannot be narrowly construed to mean the State must prove actual presence as a precursor of guilt under the theory of accomplice liability. (App. 904). In so ruling, the PCR court relied on *State*

v. *Blackwell*, 220 S.C. 342, 67 S.E.2d 684 (1951), and *State v. Chavis*, 277 S.C. 521, 290 S.E.2d 412 (1982). (App. 904).

In *Blackwell*, this Court upheld Blackwell's conviction under the theory of accomplice liability where he and others planned the commission of the crime, but he waited out of town during the commission of the crime. 220 S.C. 342, 67 S.E.2d 684 (1951). At trial, Blackwell moved for a directed verdict, but was denied. *Blackwell*, 220 S.C. at 350, 67 S.E.2d at 688. The Court affirmed because the accomplice liability jury charge was supported by the record, even though Blackwell was not physically present during the commission of the crime. *Id.* Here, just as in *Blackwell*, there was enough evidence presented to deny a directed verdict, and charge the jury on accomplice liability.

Importantly, the PCR court likened the present facts to the evidence presented in *State v. Chavis*, 277 S.C. 521, 290 S.E.2d 412 (1982). Chavis was convicted of armed robbery. *Chavis*, 277 S.C. at 522, 290 S.E.2d at 412. At trial, the State presented evidence that Chavis: met with three other men to plan the robbery; supplied two of the men with sawed-off shotguns, masks, and gloves; drove those two men to the scene; waited with the two men for the fourth man to arrive; left the scene and awaited the commission of the crime from three miles away; and met up with the others after the robbery at a designated location to divide the proceeds. *Id.* Chavis moved for a directed verdict, arguing the State failed to present sufficient evidence that he was present at the scene when the crime was committed. His motion was denied. *Id.* This Court held, "Even though [Chavis] did not accompany the actual perpetrators, 'submission of the case to the jury [was] justified.'" *Id.* at 523, 290 S.E.2d at 413.

Pursuant to *Chavis*, the PCR court correctly concluded the State did not have to prove actual presence as a precursor of guilt under the theory of accomplice liability. Therefore, the PCR

did not err in finding trial counsel was not deficient for failing to make this argument at either the directed verdict, or charge conference, stage of trial.

As for prejudice, the PCR court concluded the alleged deficiency did not prejudice Goodwin for two reasons: (1) if the argument had been made at either stage of trial, there was sufficient evidence presented to support the State's theory of accomplice liability to submit the question to the jury; and (2) the trial court actually ruled on the issue. The PCR court's first conclusion as to prejudice is a correct conclusion of law because it is supported by the record; however, the PCR court's second conclusion as to prejudice is a finding of fact. As previously mentioned, the PCR court's second conclusion, that Goodwin failed to prove he was prejudiced by trial counsel's alleged deficiency because the trial court actually ruled on the issue is supported by the record. (App. 572). Certiorari should be denied because Goodwin did not suffer prejudice because the trial court ruled on the issue.

The PCR court did not err in finding trial counsel was not ineffective. The PCR court correctly found trial counsel was not deficient for failing to make an argument that is not the law. The PCR court correctly concluded Goodwin was not prejudiced because accomplice liability was supported by evidence in the record, and the trial court actually ruled on the issue of presence. Certiorari should be denied.

II. Whether the PCR court properly found trial counsel was not ineffective for failing to pursue an alibi defense when trial counsel articulated a reasonable trial strategy?

Goodwin argues trial counsel was ineffective for failing to pursue an alibi defense. Specifically, he argues trial counsel was deficient for failing to call Mother, to testify at trial. Goodwin argues he was prejudiced by trial counsel's alleged deficiency because Mother's testimony would have supported his claim that he did not participate in the home invasion and

murder of the victims. These arguments are without merit because trial counsel made a reasonable strategic decision not to pursue an alibi defense.

“Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 529 (1992).

Trial counsel testified at the PCR hearing that in hindsight, he should have put up alibi witnesses. He also testified that in his mind, whether Goodwin was present or not at the time of the crime was not an issue. Hindsight of trial counsel does not establish ineffective assistance of counsel. *See Strickland*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

Goodwin argued at the PCR hearing that Mother’s testimony would have established that he and his co-defendant separated from each other after dropping off the Bracey brothers and that this would have created reasonable doubt that there was a plan for Goodwin to pick up the Bracey brothers after the crime. Mother testified at the PCR hearing. (App. 863–70). Mother testified that she lived in Camden with her daughter, who was six years old, Goodwin, and his wife. (App. 864–65). She stated on the night of the incident, Goodwin returned home, where she lived, around 8:00 p.m. She testified that she was thirsty for a glass of milk around 7:45 p.m., but the milk in the refrigerator belonged to her Goodwin’s wife, so Mother called Campbell to ask permission to take some. (App. 865–67). She stated Goodwin never answered the phone, but fifteen minutes later, she saw him and Cameren Kelley in her kitchen. (App. 867). After a quick conversation,

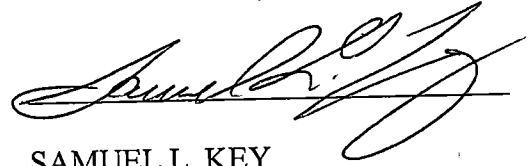
Kelley left the house to go back home, and Goodwin went into his room with his wife. (App. 867–68). She stated Goodwin has a car that is listed in her name, but he does not drive because he does not have a driver’s license. Mother testified that she told trial counsel about this incident, but he did not use her as an alibi witness. (App. 868–70).

The PCR court concluded that trial counsel was not deficient for failing to call Mother to establish that he was not present during the commission of the crime, and that even if trial counsel were deficient, there is not a reasonable probability that the outcome of the trial would have been different. (App. 907).

Trial counsel stated the reason he did not pursue an alibi defense was because “the State was really pushing . . . that he was the mastermind. He was a conspirator. He was the provider of weapons. He was the main guy. Now they weren’t pushing about the presence. . . . So that’s what they were focusing on, on those elements. Not necessarily being present at the - - everybody [knew] [Goodwin] was not present at the shooting.” (App. 852). This testimony shows that trial counsel’s focus was on attacking the State’s accomplice liability theory. It was reasonable for trial counsel to not call an alibi witness when it was not disputed that Goodwin was not present when the crime occurred. Therefore, the PCR court did not err in finding trial counsel was not deficient. Because trial counsel was not deficient for employing a reasonable trial strategy, Goodwin did not suffer prejudice. Certiorari should be denied.

CONCLUSION

Based on the foregoing argument, trial counsel was not ineffective. Trial counsel did not render deficient performance, nor did Goodwin suffer from any of the alleged deficiencies. Therefore the State requests certiorari be denied.



SAMUEL L. KEY
Assistant Attorney General

Post Office Box 11549
Columbia, S.C 29211
(803) 734-3737

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 17 2018

S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY

Honorable George C. James, Jr., Circuit Court Judge

Appellate Case No. 2018-000968

VERNON GOODWIN,PETITIONER,

v.

STATE OF SOUTH CAROLINA,RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned do hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Elizabeth A. Franklin-Best, Esquire
Blume, Norris, & Franklin-Best, LLC.
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201**

I further certify that all parties required by Rule to be served have been served. This 17th day of December, 2018.


KAITLYN S. SLICE
LEGAL ASSISTANT



RECEIVED

DEC 17 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

December 17, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Vernon Goodwin v. State of South Carolina
Appellate Case No. 2018-000968

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to the Petition for Writ of Certiorari** in the above-referenced post-conviction relief appeal for filing with the Court. Petitioner is simultaneously being served with a copy of this Return.

Please let me know if I can provide anything additional to the Court on this matter.

Sincerely,

Samuel L. Key
Assistant Attorney General
SC Bar #103206

SLK/ks

cc: Elizabeth A. Franklin-Best, Esquire
Victim Advocacy Division (without enclosure)