STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Beaufort County

R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JAN 14 2019

S.C. SUPREME COURT

MALCOLM BRABHAM,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2018-001425

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did trial counsel provide ineffective assistance by inexplicably failing to request an alibi jury charge when trial counsel elicited testimony from witness Reah Gonsalves that indicated Petitioner was at home during the time of the crime and argued in closing that he could not be two places at once?

STATEMENT

Petitioner was charged with attempted murder for what allegedly occurred between him and Chadwick Mitchell on the night of July 15, 2013. Mitchell and Petitioner met in 2003 when Petitioner began dating Mitchell's sister, Reah Gonsalves. App. 139, lines 7-14. Over the course of the next several years, Petitioner and Gonsalves had three children together and lived together on family land where Mitchell also lived. App. 140, lines 5-6; App. 141, lines 1-8; App. 163, line 14 – App. 164, line 2; App. 230, line 24 – App. 232, line 3.

On the night of the incident that led to Petitioner's arrest, between 5:00 p.m. and 5:30 p.m., Petitioner and Mitchell sat in the yard drinking beer and liquor. App. 141, lines 12-24. Petitioner and Mitchell then travelled to an area of Lady's Island in Beaufort County called "The Hole" where they socialized and continued drinking alcohol. App. 142, line 8 – App. 143, line 2; App. 164, lines 10-23. On the way to The Hole, Mitchell used a large quantity of cocaine. App. 156, lines 15-24; App. 165, lines 18-20; App. 165, line 24 – App. 166, line 11; App. 170, lines 17-22; App. 172, line 12 – App. 173, line 6.[1]

At The Hole, Petitioner and Mitchell met up with Elaine Blake, who was Petitioner's cousin, and Norman Singleton, who was Blake's boyfriend. In his inebriated state, Mitchell believed

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[1] Mitchell admitted he had alcohol and cocaine in his system the day of the shooting and agreed he used cocaine that day. Asked where and when he used cocaine, Mitchell responded, "I was probably in [Petitioner's] car." The prosecutor again prompted Mitchell to tell the jury when he used cocaine, and Mitchell responded, "Maybe right before we got to The Hole." App. 156, lines 22-25. According to the treating physician in the emergency room, Mitchell had high levels of alcohol and cocaine in his system. App. 297, lines 16-24; App. 300, line 9 – App. 302, line 2. However, Mitchell denied drug and alcohol use upon his admission to the emergency room. App. 299, lines 16-25.

Petitioner was flirting with Blake. App. 143, lines 5-13. Mitchell became enraged and belligerent[2]; he argued with everyone at The Hole. App. 157, line 24 – App. 158, line 5; App. 170, line 23 – App. 171, line 11; App. 174, lines 7-15; App. 176, line 23 – App. 178, line 2. After dark, Petitioner and Mitchell decided to leave The Hole. App. 143, line 14; App. 143, line 24 – App. 144, line 7; App. 166, lines 12-14. Blake joined Mitchell and Petitioner in the car because Blake and Mitchell planned to go out later. App. 142, line 14 – App. 143, line 18; App. 157, lines 12 -23; App. 179, line 25 – App. 180, line 10. During the ride, Mitchell continued to accuse Petitioner and Blake of improprieties, including calling Blake a "nasty bitch." App. 145, lines 10-18; App. 178, line 23 – App. 179, line 3. Blake would not stand for Mitchell's continued insults and demanded to be let out of the car. Petitioner stopped the car and allowed Blake to get out. App. 145, line 21 – App. 148, line 11; App. 179, lines 3-12. However, Blake's absence did not stop Mitchell's abusive behavior. He continued to hurl accusations at Petitioner. App. 148, lines 13-14. Finally, Petitioner insisted Mitchell get out of the car too. App. 148, lines 15-19.

Here, the evidence differed concerning what transpired next. Mitchell initially told the responding officer that Petitioner reached into the open driver's door, retrieved a gun, and shot him. App. 169, line 23 – App. 170, line 2. However, at trial, Mitchell claimed that Petitioner also got out of the car, closed the driver's door, and the two "started throwing more obscenities at each other." Then, Petitioner "kind of pulled the gun like a - - it was like a western movie. I didn't even really see it coming. Between us arguing, he just pulled out and, boom, shot me, you know." App. 149, lines 4-11; see also App. 166, line 15 – App. 167, line 10 (testifying that Petitioner pulled the gun

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[2] Mitchell was enraged because the man he considered his brother-in-law appeared to be flirting with another woman even though he was in a relationship with and had children with Mitchell's sister, Reah Gonsalves.

"from behind his jeans").[3] App. 167, line 15 – App. 168, line 1. Mitchell claimed he grabbed his chest and collapsed while Petitioner looked on. Mitchell further claimed that Petitioner "looked around," "jumped in the car and just peeled out," leaving Mitchell on the side of the road. App. 150, lines 13-20. Mitchell bled profusely after the shooting. App. 154, lines 8-11.

After being shot in the chest, Mitchell, smelling of alcohol, walked to the first house with lights on, which was almost a mile from the alleged incident location, and asked the residents to call for help. App. 128, lines 18-24; App. 153, lines 1-6; App. 255, lines 1-4. He arrived at the house between ten and fifteen minutes after the shooting. App. 154, lines 1-5. The responding officer was dispatched at 9:15 p.m. and responded at 9:23 p.m. App. 134, lines 6-10. Mitchell told the residents and the police, who subsequently arrived, that his brother-in-law, Petitioner, had shot him. App. 125, line 20 – App. 126, line 7; App. 132, lines 4-11; App. 153, lines 17-25; App. 154, lines 12-18.

Armed with Mitchell's accusations, officers went to Gonsalves's home looking for Petitioner. App. 190, lines 4-12; App. 191, line 19 – App. 192, line 4. When the officer arrived at 10:05 p.m., Gonsalves stated Petitioner was no longer at the residence, having left about forty-five minutes prior to the officer's arrival. App. 192, line 5 – App. 193, line 2; App. 245, line 7 – App. 246, line 2. Also, Petitioner contacted Blake to say he was on his way to his mother's home in Ridgeland around 9:15 p.m. App. 183, lines 3-9; App. 185, line 23 – App. 186, line 9. The following day, the police arrested Petitioner at his job without incident. When the arresting officer interrogated Petitioner regarding his alleged involvement in Mitchell's shooting, Petitioner informed the officer he had not shot Mitchell, but had left him on the side of the road at The Hole. App. 211,

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[3] Blake did not see Petitioner in possession of a gun or a gun in the car. App. 184, lines 13-14; App. 185, lines 9-16.

line 12 – App. 212, line 17; App. 264, line 20 – App. 265, line 3; App. 266, line 14 – App. 269, line 2.

No evidence of a shooting, such as blood, shell casings, projectiles, or gunshot residue, was found at the area where Mitchell claimed the shooting occurred or in Petitioner's car. In fact, no gun was recovered. App. 188, line 20 – App. 190, line 3; App. 252, lines 3-9; App. 252, line 22 – App. 253, line 7; App. 254, lines 2-25; App. 273, line 19 – App. 275, line 24; App. 283, line 23 – App. 284, line 5; App. 285, lines 5-25. Further, no one in the area heard any gunshots. App. 191, lines 5-18.

On September 20, 2013, a Beaufort County grand jury indicted Petitioner for attempted murder and possession of a weapon during the commission of a violent crime. App. 380. The State, represented by Mary Jordan Lempesis and Mary Concannon, called the case for trial before the Honorable Roger M. Young and a jury on April 21, 2014. Trasi Campbell represented Petitioner. App. 1-2. The jury found Petitioner guilty as charged. App. 363, lines 17-24. Judge Young sentenced Petitioner to twenty years' imprisonment for attempted murder and five years' imprisonment for the weapon charge. He ordered the sentences to be served concurrently. App. 375, lines 6-9; App. 382.

Petitioner filed a notice of appeal, which was perfected by Susan B. Hackett. App. 377–96. Appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). App. 377–96. The Court of Appeals dismissed the appeal on October 21, 2015. App. 397–98; *State v. Brabham*, 2015-UP-498 (S.C. Ct. App. filed Oct. 21, 2015).

On May 2, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 400–14. Petitioner filed an amended application through his attorney James Falk on July 10, 2017. App. 419–20. On January 29, 2018, the matter proceeded to an evidentiary hearing before

the Honorable R. Lawton McIntosh. App. 422–66. Falk represented Petitioner, and DeShawn Mitchell represented the State. App. 423. At the conclusion of the hearing, Judge McIntosh took the matter under advisement. App. 464–65. On April 10, 2018, Judge McIntosh issued a written order denying relief. App. 468–77. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance by inexplicably failing to request an alibi jury charge when she elicited testimony from witness Reah Gonsalves that indicated Petitioner was at home during the time of the crime and argued in closing that he could not be two places at once.

Relevant Facts

At trial, the State called Deputy Travis Hovest to testify about his involvement in the case. App. 187, line 19–App. 190, line 12. On cross-examination, Deputy Hovest testified he arrived at the home of Reah Gonsalves at 10:05 p.m. App. 192, lines 5–23. He confirmed Gonsalves told him Petitioner had been there and had left about forty-five minutes before he got there, at approximately 9:15. App. 192, line 24–Spp. 193, line 2.

At first, Reah Gonsalves testified that Petitioner had left with Mitchell at some point that evening and had returned about 9:48 or 9:50ish. App. 234–35. However, she admitted on cross-examination that she recalled telling Deputy Hovest Petitioner had been there at the house with her and the kids until about forty-five minutes prior to the officer's arrival, which would have placed Petitioner at the home until 9:15-9:20. App. 245, lines 7–22.

At closing, trial counsel argued to the jury: "I think you all can tell this *by the evidence* at this point, is that you can't be in two places at one time." App. 333, lines 9–11 (emphasis added). She stated, "Well, thankfully, Malcolm was at another location at the time that Chad was being shot." App. 333, lines 16–17. She highlighted Deputy Hovest's testimony that when he went to Petitioner's house at 10:00 that night and talked to Gonsalves, she told him, "Yes, Malcolm was home. He was here. He was with me and the children. He left our home about 45

minutes ago, which makes it about 9:15. Can't be two places at one time." App. 334, lines 14–22.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). An appellate court will reverse the decision of the PCR court when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

In *Riddle v. State*, 308 S.C. 361, 363, 418 S.E.,2d 308, 309 (1992), our Supreme Court found "[t]he failure to give an alibi charge, where the defendant claims to be at another place, is reversible error." In that case, the judge asked counsel if she wanted an alibi charge and she declined. The Court found "[c]ounsel's rejection of the charge at trial constitutes inadequate legal representation." *Id.* "To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime." *State v. Diamond*, 280 S.C. 296, 297, 312 S.E.2d 550, 550 (1984) (quoting *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980)).

Our Supreme Court has held "trial counsel's failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed." *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Additionally, the Court stressed that trial counsel must articulate a valid reason for the strategy she employs in order to avoid a finding of ineffectiveness. *Id.* "An alibi charge places no burden on a

criminal defendant but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime." *Id.*

Here, trial counsel did present some evidence that Petitioner was in another place at the time of the crime by eliciting testimony from Gonsalves and Deputy Hovest that Gonsalves told him Petitioner was at home with her and the children until forty-five minutes before the officer arrived. The evidence showed Petitioner was at home at 9:00 p.m., which would have been the time of the shooting based on Mitchell's testimony. App. 154, lines 1–5. When asked at the PCR hearing whether it was a trial decision not to ask for the charge, trial counsel simply stated, "I didn't have an alibi for him." App. 450, lines 7–9. When asked again for her reason not to ask for the charge, she stated, "I did not have in the record any testimony that placed Malcolm, you know, somewhere other than, you know, at the location where Mr. Mitchell was shot in the chest. And that - - without that evidence, there was no basis to request the alibi charge." App. 451, lines 2–9. She did not articulate a valid reason for employing a certain strategy; indeed, she did not profess to have a strategy for the decision. She simply stated there was no evidence for an alibi. However, as noted above, she did elicit testimony from both Deputy Hovest and Gonsalves that Gonsalves told Hovest Petitioner was at her home until about forty-five minutes before the officer's visit, which would have meant he was there until around 9:15-9:20. As trial counsel herself argued to the jury in her closing, "Malcolm was at another location at the time that Chad was being shot." App. 333.

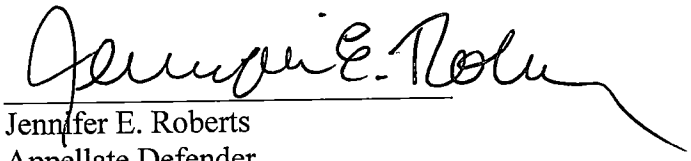
By not requesting a jury instruction on alibi, trial counsel left the jurors unequipped to use what she argued during her closing—that Petitioner could not be two places at one time—to guide them to a not guilty verdict. The alibi charge would have given the jury the tools needed to make sense of Gonsalves's testimony combined with trial counsel's closing argument. A closing argument is not a substitute for a charge on the law. *See* S.C. Const. art. V, § 21 ("Judges shall not

charge juries in respect to matters of fact, but shall declare the law."). Juries are told by the judge that arguments of counsel are not evidence, so the jury may have been skeptical—and rightly so—of what defense counsel said during her closing regarding Petitioner's alibi. Right before closing arguments, the trial judge told the jury, "Reminder: what the lawyers say now is not to be considered by you as evidence." App. 319, lines 16–17. Trial counsel should have requested an alibi charge so that the trial judge could give that specific instruction to the jurors to provide them with a legal basis for considering the evidence presented regarding Petitioner's alibi to the crime.

The PCR judge denied and dismissed the allegation, finding "there was insufficient evidence presented at trial to warrant such a request to charge on alibi and had one been requested it would have been denied." App. 475. This was an error of law. The test is not "sufficient" evidence, which indicates a weighing of the evidence. Rather, our caselaw is clear that the standard is any evidence. *See Ford v. State*, 314 S.C. 245, 442 S.E.2d 604 (1994) (holding trial counsel's failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed); *Riddle v. State*, 308 S.C. 361, 363, 418 S.E.,2d 308, 309 (1992) ("The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error."); *State v. Diamond*, 280 S.C. 296, 297, 312 S.E.2d 550, 550 (1984) (quoting *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980) ("'To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.'")). Because the PCR judge determined that not enough evidence was presented when the standard was *any* evidence, his findings of fact and conclusions of law were in error. Trial counsel should have asked for an alibi charge, gave no strategic reason for not requesting it, and this Court should reverse the PCR judge's finding.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition, but dispenses with briefing, Petitioner respectfully requests this Court reverse the PCR court and order a new trial in his case.



Jennifer E. Roberts
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 2019.

STATE OF SOUTH CAROLINA

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Certiorari to Beaufort County

R. Lawton McIntosh, Circuit Court Judge

MALCOLM BRABHAM,

PETITIONER,

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 have been served upon Christian Saville, 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 Malcolm Brabham, #359777, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 14th day of January, 2019.

Jennifer E. Roberts
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.