

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SUMTER COUNTY
Howard P. King, Trial Judge
George C. James, Jr., Post-Conviction Relief Judge

Appellate Case No. 2018-001118

CAMEREN L. KELLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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RESPONDENT'S STATEMENT OF ISSUES

I.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for not calling Petitioner's mother as an alibi witness when Petitioner's mother did not have an alibi for Petitioner and her testimony was entirely consistent with the State's theory of Petitioner's guilt?

II.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for not moving for a directed verdict or asking for a mere presence instruction when trial counsel did move for a directed verdict and the trial judge gave the jury a mere presence instruction?

STATEMENT OF THE CASE

Petitioner, Cameren Kelley is presently confined in the South Carolina Department of Corrections following his conviction at trial in Sumter County. On December 14, 2009, Petitioner drove his co-defendant's Vernon Goodwin, Carlton Bracey, and Calderone Bracey to rob a residence in Sumter County. Carlton and Calderone Bracey were brothers. The four men planned the robbery together. Goodwin knew of a house in Sumter County that had both drugs and money. Goodwin had visited the residence the previous night. Goodwin suggested that the Bracey brothers should rob this house and instructed them how to do so. Goodwin provided the Bracey brothers with guns, masks, gloves, and duct tape to use during the robbery. Petitioner drove the three men to the residence and dropped the Bracey brothers off. Goodwin remained with Petitioner and waited for the Bracey brothers to call and request pickup after the robbery was completed. The robbery did not go as planned. After the Bracey brother's entered the house, a shootout ensued between the Bracey Brothers and the residents of the house. During the shootout, Kemper Holiday, Hugh Phillips, Lance McCray, and Calderone Bracey were each shot. Holiday died from his wounds and Phillips was paralyzed.

During its May 2011 term, the Sumter County Grand Jury indicted Petitioner for murder, burglary 1st degree, eight counts of kidnapping, two counts of assault and battery with intent to kill, five counts of assault with intent to kill, two counts of armed robbery, and six counts of attempted armed robbery (2011-GS-43-0881). Petitioner was represented on all charges by David F. Sullivan, Esquire. Assistant Solicitors John Meadors and Glenn Manning of the Third Circuit Solicitor's Office prosecuted the case.

On September 23, 2011, Petitioner was convicted on all charges by a jury in the Sumter County Court of General Sessions before the Honorable Howard P. King. Petitioner was

acquitted of murder but the jury returned a guilty verdict on the lesser included charge of voluntary manslaughter and guilty verdicts on all remaining charges. The trial judge sentenced Petitioner to a term of twenty years' imprisonment on each of the attempted armed robbery counts, thirty years' imprisonment on each of the armed robbery counts, ten years' imprisonment on each of the assault with intent to kill counts, twenty years' imprisonment on each of the assault and battery with intent to kill counts, thirty years' imprisonment on each of the kidnapping counts, thirty years' imprisonment on voluntary manslaughter, and forty years' imprisonment on burglary 1st degree. All counts were to run concurrently with each other resulting in an aggregate sentence of forty years' imprisonment.

Petitioner filed a notice of appeal challenging his conviction and sentence. Petitioner was represented in his appeal by Robert M. Pachak, Esquire. Appellate counsel filed an Anders brief and a motion to be relieved as counsel with the Court of Appeals. The Court of Appeals dismissed Petitioner's appeal on December 12, 2012. The Remittitur was returned to the circuit court on January 4, 2013.

On February 6, 2013, Petitioner filed a *pro se* application for post-conviction relief (2013-CP-43-205), alleging two grounds for relief. Petitioner alleged that trial counsel was ineffective for: (1) failing to "investigate and render reasonable performance, counsel failed to lodge timely objections", and (2) "Due process violation." Respondent served its return to the application and requested an evidentiary hearing on the application on December 10, 2013. An evidentiary hearing was convened on April 17, 2015, before the Honorable George C. James, Jr. Petitioner was present alongside counsel Ronald Lloyd, Esquire. Respondent was represented by Assistant Attorney General Daniel F. Gourley of the South Carolina Attorney General's Office.

Petitioner presented testimony from trial counsel and Petitioner's mother. Respondent did not call any witnesses.

On January 15, 2018, Judge James issued a written order denying the application in full. This order was filed with the Sumter County Clerk of Court on January 16, 2018. An order denying Petitioner's motion for reconsideration was filed on May 15, 2018. Petitioner filed his notice of appeal to this Court on June 13, 2018. On appeal, Petitioner challenges the post-conviction relief judge's denial of relief for the allegation that trial counsel failed to develop an alibi defense, and that trial counsel failed to argue for a directed verdict and a mere presence instruction.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for not calling Petitioner's mother as an alibi witness because Petitioner's mother did not have an alibi for Petitioner and her testimony was entirely consistent with the State's theory of Petitioner's guilt.

Petitioner claims the post-conviction relief court erred in denying Petitioner relief for trial counsel's failure to present an alibi defense. Petitioner specifically claims trial counsel should have called Petitioner's mother Pamela Kelley as an alibi witness. Petitioner's argument is without merit. Trial counsel was not deficient in failing to call Pamela Kelley because Petitioner admitted to law enforcement that he and Goodwin drove the Bracey brothers near the scene of the crime and dropped them off. Petitioner told law enforcement that he drove the Bracey brothers to the location so they could buy marijuana. (App. 243-44). Therefore, trial counsel's defense was that Petitioner had no knowledge of the Bracey brother's plans to commit a robbery. Trial counsel's failure to call Pamela Kelley did not prejudice Petitioner in any way because her testimony did not provide Petitioner with an alibi. Pamela Kelley merely said Petitioner was at home at by 8:30. This testimony is consistent with the State's theory of the case that Petitioner dropped the Bracey brother's off at the scene of the crime and waited for their phone call after the robbery was completed. Because Pamela Kelley's testimony did not provide Petitioner an alibi, there was no deficiency in trial counsel's representation for not calling her as a witness nor was there any prejudice to Petitioner by trial counsel not calling Petitioner's mother as a witness. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI;

Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

Moreover, “counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500, 505 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v.

State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Here, Petitioner complains that trial counsel should have called his mother as an alibi witness to prove that Petitioner was not at the scene of the crime when it occurred. However, the State never claimed Petitioner was at the scene of the crime when the crime occurred. The State always maintained Petitioner drove the Bracey brother's to the scene and intended to pick them up after the robbery was complete. Petitioner admitted to law enforcement and trial counsel that he drove Goodwin and the Bracey brothers near the crime scene. (App. 243-44, 750). Therefore, trial counsel made the logical decision to argue that although Petitioner did drive the Bracey brothers to the crime scene, he was not culpable for subsequent crimes because he did not know what the Bracey brothers were planning to do. Trial counsel was not deficient in his representation for failing to call Petitioner's mother as a witness because her testimony did not provide an alibi for Petitioner. Because Pamela Kelley's testimony did not provide an alibi for Petitioner, Petitioner was not prejudiced by trial counsel's failure to call her as a witness. The post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations warranting relief and these findings are supported by the record. This Court should deny certiorari.

II.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to move for a directed verdict and for failing to ask for a mere presence instruction because trial counsel did move for a directed verdict and the trial judge gave the jury a mere presence instruction.

Next, Petitioner contends trial counsel erred by not moving for a directed verdict of acquittal and for not asking the trial judge to charge the jury with a sufficient mere presence

instruction. Petitioner acknowledges the trial judge did charge mere presence to the jury, “**but not completely as to how one must personally commit the crime or be present at the scene of the crime intentionally.**” (Petition for Writ of Certiorari 6). Petitioner’s arguments are without merit. Trial counsel did in fact move for a directed verdict. (App. 569). Trial counsel did not need to request a mere presence charge because the trial judge informed both sides that he would charge it. (App. 582). Petitioner contends trial counsel should have requested an instruction which specified that Petitioner must have personally committed the crime or been present at the scene of the crime intentionally. The very language that Petitioner claims was not charged to the jury was, in fact, charged to the jury. The trial judge made the following charge on mere presence and accomplice liability:

To be guilty as an aider or abettor the participant must have knowledge of the principal’s criminal conduct. Mere presence at the scene is not sufficient to establish guilt as an aider or abettor. The mere presence of a defendant where a crime has occurred or a mere association by a defendant with persons who have committed a crime, is insufficient proof that the defendant has committed a crime.

Evidence that an individual is present at the time the crime is committed is not in and of itself sufficient proof that the individual committed the crime. The mere knowledge that another person is going to commit a crime even if defendant is present when the crime is committed is not sufficient to convict the Defendant as a principal.

The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. **To be guilty of the crime the person must personally commit the crime or be present at the scene of the crime and intentionally or through some common design aid, abet, or assist in the commission of the crime through some overt act.**

(App. 677-78, lines 19-1)(emphasis added). Trial counsel cannot be deficient for failing to request a jury instruction that was actually charged to the jury. Furthermore, Petitioner cannot be prejudiced by trial counsel’s failure to request a jury charge when that jury charge is actually given. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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By: 
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February 25, 2019

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In the Supreme Court

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CERTIORARI TO SUMTER COUNTY
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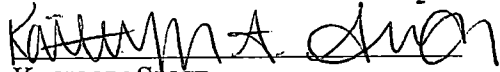
PROOF OF SERVICE

I, Kaitlyn Slice, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the mail to be delivered to Petitioner at the address below:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 25 day of FEBRUARY, 2019.



KAITLYN SLICE
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ALAN WILSON
ATTORNEY GENERAL

February 25, 2019

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S.C. SUPREME COURT

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

Re: Cameren Laroderick Kelley v. State of South Carolina
Appellate Case No. 2018-001118
Lower Court Case No. 2013-CP-43-0205

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Scott Matthews
Assistant Attorney General
SC Bar No. 101464

JSM/ks
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)