

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2016-CP-43-02038
Appellate Case No: 2018-002268

London A. Kelley #362015

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S.C. SUPREME COURT

Petitioner,

V.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE FOR A CONTINUANCE WHERE HE HAD NOT PROPERLY INVESTIGATED THE CRIME, REVIEWED THE ENTIRE FILE, OR EXPLORED THE POSSIBILITY OF OBTAINING EXPERT WITNESSES, AND PETITIONER WOULD NOT HAVE BEEN FOUND GUILTY OF ACCESSORY AFTER THE FACT TO MURDER IF COUNSEL HAD NOT BEEN INEFFECTIVE. 6

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QUESTION PRESENTED

Did the Circuit Court err in finding that Petitioner was not entitled to post conviction relief where she demonstrated that counsel was ineffective in failing to move for a continuance since he had not properly investigated the crime, reviewed the entire file, or explored the possibility of obtaining expert witnesses in the two days prior to undertaking representation and Petitioner would not have been found guilty of accessory after the fact to murder if counsel had not been ineffective?

STATEMENT OF THE CASE

The Sumter County grand jury indicted Petitioner in August 2014 for murder, accessory after the fact of murder, and conspiracy. App. A-1043-1044. On October 31, 2014, after a jury trial over which the Honorable George C. James, Jr. (then a circuit court judge, now a Supreme Court justice) presided, Petitioner was convicted of accessory after the fact of murder and sentenced to twelve years imprisonment. App. A-1041. Charlie Johnson represented Petitioner and Assistant Solicitor Jason Corbett represented the State. On November 4, 2015, Lara M. Caudy of the Division of Appellate Defense submitted a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and the Court of Appeals affirmed her conviction on June 29, 2016. *State v Kelley*, 2016-UP-333 (filed June 29, 2016). App. A-0907-0928.

Petitioner, represented by Hemphill P. Pride II, filed an action for post-conviction relief on October 28, 2016 in the Sumter County Court of Common Pleas. She alleged that counsel was ineffective for failing to move for a continuance when he was retained two days prior to trial and did not have adequate time to prepare the case. He also alleged that counsel was ineffective for failing to argue mitigation at sentencing. The State filed its return on March 7, 2017. App. A-0929-0937. The Honorable Deandra G. Benjamin, Circuit Court Judge, held an evidentiary hearing on March 26, 2018, during which Mr. Pride represented Petitioner and Julie A. Coleman of the South Carolina Attorney General's Office represented the State. App. A-0938. The State called Timothy Murphy, the public defender, who originally represented Petitioner, as its only witness. Petitioner called John and Carolyn Johnson, who are Petitioner's child's grandparents; private investigator Benny L. Webb; and Petitioner as witnesses.

The record before the PCR court, including the Record on Appeal containing the entire trial transcript, revealed that Petitioner had been convicted of accessory after the fact to murder based entirely on the statements of three jailhouse snitches. The State's star witness Suzie Oaks was a

cellmate of petitioner's at the county jail in the beginning of 2014. She had a long criminal record, including lying in court under oath. App. A-0611, 0620. On February 2, 2014, shortly before being transferred to the Department of Corrections, she gave a statement to Investigator Jennifer Thomas of the Sumter County Sheriff's Department. Oaks provided an exhaustive eleven-page tale in which petitioner allegedly confessed to direct participation in setting up the victim, Darrell Epps, to be robbed and witnessing her boyfriend, Quinton Brown, shoot the victim in the head in Epp's truck. App. A-0893-0904. Her story did not comport with salient facts.

Epps's body was found on April 10, 2011 at the Gem Mobile Home Park, near where Petitioner lived with Brown. App. A-0297-0299, 0656. His partially burnt out truck was found early that morning a mile and a half away in a swampy area near a lake. App. A-0306-0309. The evidence showed that Epps had been shot in the head with a shotgun at the location where his body was found. App. A-0373. He also had several other wounds caused by a handgun that appeared to be delivered while he was moving. App. A-0496-497. There was no evidence of a gun being fired in his truck. App. A-0318-0320.

Petitioner, Brown, and two other friends went up to the police at a neighboring mobile home park and told them there was a body in Gem Mobile Home Park. App. A- 0397-0398. Petitioner and Brown cooperated with police and a search of Brown's car yielded no evidence. App. 0509-0512. No forensic evidence connected Petitioner or Brown to Epp's murder. There were no cell phone records, motel records, or DNA submitted to connect them to the crime, or even to the victim.

In addition, there was no evidence, except from the jailhouse snitches, that they even knew Epps. Epps's longtime close friends and fiancé testified at trial that they had never heard of Petitioner or Brown having contact with Epps. App. A-0145-0146; 0162, 0181.

In contradiction, Oaks recounted Epps and Petitioner had a long affair, with encounters at the American Motel. No records from the hotel were introduced into evidence. No cell phone records showing contact between the two were produced at trial.

Oaks contradicted the known forensic evidence by stating that Epps was shot in the truck. She also claimed that Petitioner told her that Brown shot him on an isolated road and for some unknown reason they drove the body back to their own mobile home park and deposited the body near their own trailer. Then Brown took the truck back to an isolated area, attempted to burn the truck, and walked back a mile and a half in the pouring rain. App. A-0895-0905.

The State's case remained dormant for twenty months until Investigator Thomas reached out to inmate Edward Brown at the Wateree Correctional Institution in December 2013. His lawyer had contacted her. App. A-0533, lines 12-16. Brown told her that Petitioner told him she felt bad for setting up Epps to be robbed. His statement included the allegation that Petitioner stated that she left a club in Sumter with Epps. However, there was no evidence that either one went to that club. Edward Brown claimed that Petitioner said Epps was shot at Gem Mobile Home park while she was inside her trailer. App. A. 0523-0524; 0682-0683.

Edward Brown further stated that Christopher Lovely was involved in the shooting but there was no evidence that he was questioned about the crime. App. A-0536. Edward Brown also stated that this conversation with Petitioner occurred in the Summer of 2011 in Room 212 of the America's Inn, where they often met. App. A-0519, lines 6-10; 0524-0525. However, no records were produced to substantiate that claim.

Brown testified at trial that he made the statement after being promised an earlier release from the prison sentence he was serving for his armed robbery conviction. App. A-0532, lines 19-22. He agreed that he would do whatever he had to do to get out of jail. App. A-0537, lines 11-14.

Suzie Oaks's daughter, Shaniaqua Oaks, was also housed with Petitioner in 2014 and gave a statement implicating Petitioner. She alleged that Petitioner told her a story about a plan for her boyfriend to rob a drug dealer that "went bad." App. A-0894. She said that her boyfriend killed him and left the body in their backyard. She supposedly called the police the next morning to report the body. However, the evidence shows the body was not in her backyard and that Petitioner did not call the police. App. A-0416, lines 15-24; 0656, lines 6-20.

The jury deliberated for over six hours, asking several questions, before deciding to convict Petitioner of accessory after the fact to murder. App. A-0841, lines 23-24; 0842; 0845; 0853; 0863; 0868.

After the PCR hearing, Judge Benjamin denied the application by written order filed November 19, 2018. App. A-1033-1040. Attorney Pride received written notice of the entry of this order on November 27, 2018. Petitioner, now represented by the undersigned counsel, filed a notice of appeal which was served on December 21, 2018. Petitioner now seeks a writ of certiorari to review this denial.

ARGUMENT

COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE FOR A CONTINUANCE WHERE HE HAD NOT PROPERLY INVESTIGATED THE CRIME, REVIEWED THE ENTIRE FILE, OR EXPLORED THE POSSIBILITY OF OBTAINING EXPERT WITNESSES, AND PETITIONER WOULD NOT HAVE BEEN FOUND GUILTY OF ACCESSORY AFTER THE FACT TO MURDER IF COUNSEL HAD NOT BEEN INEFFECTIVE.

Petitioner Kelley was facing the most serious of charges – murder, accessory after the fact to murder, and conspiracy. She had only been indicted four months prior to her case being called for trial. Her case was set for trial in October 2014 and no continuances had been granted. Yet Attorney Johnson took on her case on the Friday before trial started.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI ; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). To overcome the presumption that counsel has rendered adequate assistance, the defendant must show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Collins v. State*, 422 S.C. 250, 810 S.E.2d 871 (2018) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)).

This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. *Council v. State*, 670 S.E.2d 356, 380 S.C. 159 (2008); *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Trial counsel’s failure to request a continuance may be the basis of post-conviction relief where the Petitioner shows prejudice. *Morris v. State*, 639 S.E.2d 53, 371 S.C. 278 (2006).

In this case, Petitioner demonstrated that trial counsel was ineffective for failing to request a continuance when he was retained two days before the start of a murder trial. His performance was not within the prevailing professional norms. Furthermore, if Attorney Johnson had prepared and investigated the case, Petitioner would not have been convicted of accessory after the fact.

At the PCR hearing, public defender Murphy, testified he began representation on January 30, 2014, shortly after she was arrested. App. A-0954. The Friday before trial began on Monday, October 27, 2014, attorney Johnson was hired to take over Petitioner's representation. App. A-0956. Murphy was notified that evening and emailed Johnson the electronic discovery that he had sometime after 10 p.m. App. A-0957, lines 1-9. He gave him additional information on Monday morning, including a comprehensive report from the private investigator. App. A-0957, lines 13-16; A-0963, lines 10-12. They discussed the case for three hours at most. App. A-0957-0959.

Murphy, who has practiced law for thirty-one years, eleven of them as a public defender, testified that he would probably not take a murder case two days before trial. App. A-0963, 0966, lines 4-9.

John Johnson, the grandfather of Petitioner's child, testified at the PCR hearing. He is retired from SLED, the Sumter County Sheriff's Department, and the United States Army. App. A-0983-0984. He and Benny Webb conducted some of the investigation in Petitioner's case. App. A-0984, lines 22-25. He hired attorney Johnson for \$17,000 the Friday before trial. App. A-0986, lines 5-20.

They went over the file the Sunday prior to trial and found a ballistics report. App. A-0987, lines 1, 16-17. Notably, the report reflected that the guns used in the murder of the victim were used in a series of other murders in Sumter County. App. A-0988, lines 1-7. The guns were found in a house that belonged to Corey Gaddy and his brother after they were arrested by the City of Sumter for murder. App. A-0988, lines 20-25. John Johnson explained that the guns tied the Gaddy boys to

the Epps murder App. A-0989, lines 1-9. Attorney Johnson advised him that he would look at the report himself because he was a “gun expert and enthusiast.” App. A-0987, lines 17-22. John Johnson was not able to watch the trial because he was sequestered (as he was on the State’s witness list) but the record shows that the evidence about the gun being tied to accused murderers was not raised at trial. App. A-0989.

Investigator Benny L. Webb testified that he is retired from SLED, the Sumter County Sheriff’s Department, the ABC Commission, and the City of Lancaster, having worked in law enforcement for 31 years. He was hired by Petitioner’s family the week prior to trial and was able to sit with attorney Johnson during the trial. App. A-0995, 1002. He testified that he picked up the file from Murphy’s office around midday on Tuesday October 27, 2014, which was the first day of testimony. App. A-0996. He testified that Attorney Johnson did not give him assignments during the case App. A-0996.

Webb also testified that attorney Johnson did not raise any issues about the guns or about DNA evidence showing three other people’s DNA in the victim’s underwear and not Petitioner’s. App. A-1004.

Petitioner testified that Murphy advised her to plead guilty rather than face a potential sixty-five-year sentence. App. A-1010-1011. She refused to plead guilty because she has consistently maintained that she had no involvement in the crime whatsoever and knew nothing of Quinton Brown’s involvement. App. A-1011, lines 17-22. She told him that she would rather do 65 years by telling the truth than in doing no time with a lie. App. A-1011, lines 1-3.

She first met with attorney Johnson for a couple of hours on the Saturday before trial. She testified at the PCR hearing that she did not know the victim and that she knew nothing about his murder. App. A-1012, lines 12-17. She stated that attorney Johnson did not talk to her about the

case during any of the down time at the trial – at lunch or in the evenings. App. A-1013. Attorney Johnson advised her not to testify at trial. App. A-1015.

Attorney Johnson did not testify at the PCR hearing as he was in Virginia and advised the State he was not attending. He was not subpoenaed to appear. App. A-0942-0950.

The evidence shows that there were several aspects of the case that warranted further investigation, including the motel records from American Inn, information about the Gaddy brothers, Christopher Lovely, and ballistic evidence showing the gun was used in a murder in the City of Sumter. Attorney Johnson did not investigate any of these matters and was not present to offer any valid trial strategy justifying his lack of investigation.

This Court has held that the “[t]he brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Collins v. State, supra* (citing *Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). *Collins* is distinguishable from Petitioner’s case. Collins’s trial counsel began representation on his drug trafficking charges forty days before trial. He testified that “it was not a complicated case” and explained the reason he did not ask for a continuance after receiving short notice of a weapons charge. He also testified that he knew eighteen days in advance of the solicitor’s intentions to seek indictment on the weapons charge. He testified at the PCR hearing that he had adequate time to prepare for trial. *Collins*, 422 S.C. at ___, 810 S.E.2d at 874.

In contrast, attorney Johnson undertook representation two days before trial. The case was complicated, as it was a murder case that had gone cold and was reopened solely by statements made by jailhouse snitches. Unlike Collins’s trial counsel, attorney Johnson did not testify that he had adequate time to prepare for trial. He even stated during sentencing that the short period of representation caused him to lack preparation to offer information about his client in mitigation. App. A-0877, lines 4-6. He offered no explanation for failing to request a continuance so that he

could investigate the report that the murder weapon had been used in a different murder. He offered no explanation for failing to challenge the assertions by the State's witnesses about Petitioner's alleged connection to the victim.

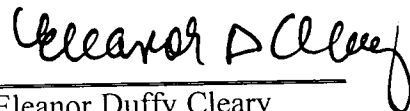
In *Harris v. State, supra*, this Court found counsel was not ineffective for failing to meet with Harris prior to his retrial. In that case, trial counsel had been retained three months prior to trial and had already tried the case two weeks prior to the second trial. He testified that he treated Harris's LWOP armed robbery case like a death penalty case, in terms of preparation. *Harris*, 377 S.C. at ___, 659 S.E.2d at 145. Again, in contrast, attorney Johnson attempted to undertake representation *two* days prior to trial. He did not testify that he prepared the case adequately and the record show that he did not.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

March 4, 2019

Respectfully submitted,



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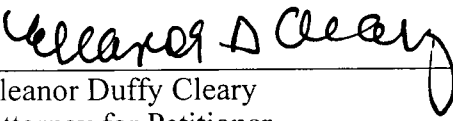
Respondent.

PROOF OF SERVICE

I, Eleanor Duffy Cleary, certify that I have served the Petition for Writ of Certiorari and Appendix by hand-delivering a copy of the same labeled with the address below on today's date:

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I further certify that all parties required by Rule 243(d), SCACR, to be served have been served on this 4th day of March, 2019


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