

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable Thomas A. Russo, Circuit Court Judge

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S.C. SUPREME COURT

JOSHUA LEE PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000476

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

Trial counsel erred in dissuading petitioner from testifying at trial regarding his alibi defense and in failing to present alibi testimony from the alibi witnesses,¹ who were present at trial and available to testify at trial, because this constituted ineffective assistance of counsel with respect to the handling of petitioner’s alibi defense. 3

CONCLUSION 7

¹ Lois Ann McLeod, Yolanda Phillips. Johnny McLeod, Stevie Riggins, and Merlin Ferguson. App. 10, l. 11-15; App. 72, l. 6-10.

ISSUE PRESENTED

Trial counsel erred in dissuading petitioner from testifying at trial regarding his alibi defense and in failing to present alibi testimony from the alibi witnesses,² who were present at trial and available to testify at trial, because this constituted ineffective assistance of counsel with respect to the handling of petitioner's alibi defense.

² Lois Ann McLeod, Yolanda Phillips. Johnny McLeod, Stevie Riggins, and Merlin Ferguson. App. 10, l. 11-15; App. 72, l. 6-10.

STATEMENT

Petitioner Joshua Lee Phillips was convicted per jury trial on two counts of murder, two counts of armed robbery, and possession of a weapon during the commission of a violent crime during the August 2009 term of the Marion County General Sessions Court before Judge Ralph King Anderson, Junior. App. 1-847. Attorneys Jack W. Lawson,³ Herverly M. Anderson, and Grayson Smith represented petitioner at trial, and Assistant Solicitor E.L. Clements and Ryan Waller appeared on behalf of the state. Petitioner was sentenced to two consecutive life-imprisonment terms on each murder conviction, and concurrent terms of thirty-years on each armed robbery conviction, and five years on the weapon conviction.

Petitioner appealed, but his convictions and sentences were affirmed by the South Carolina Court of Appeals. State v. Phillips, Op. No. 2012-UP-143 (S.C.Ct. App. filed February 29, 2012). Joseph Savitz, III, Esquire, formerly of the South Carolina Commission on Indigent Defense, represented petitioner on direct appeal.

On May 24, 2012, petitioner filed a PCR application with the Marion County Office of the Clerk of Court. App. 849-857. The respondent filed a return dated December 14, 2012, requesting that a hearing be held in the case. App. 858-861.

A PCR hearing was convened on August 30, 2017, at the Florence County Courthouse before Judge Thomas A. Russo. App. 863-947. Petitioner was present at the hearing and represented by Steven W. Fowler, and Assistant Attorney General Lindsey A. McCallister appeared on behalf of the state. On January 22, 2018, Judge Russo issued an Order of Dismissal

³ Attorney Jack. M. Lawson died on November 2, 2011; and therefore, the PCR hearing testimony taken came from Attorney Henry M. Anderson.

in the case. App. 949-964. Petitioner appealed Judge Russo's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in dissuading petitioner from testifying at trial regarding his alibi defense and in failing to present alibi testimony from the alibi witnesses,⁴ who were present at trial and available to testify at trial, because this constituted ineffective assistance with respect to the handling of petitioner's alibi defense.

Prior to trial, the defense had available for trial the following potential alibi witnesses: Lois Ann McLeod, Yolanda Phillips, Johnny McLeod, Stevie Riggins, and Merlin Ferguson. App. 10, l. 11-15. Also, prior to trial, the solicitor acknowledged that these defense witnesses were alibi witnesses during the colloquy on the sequestration motion as follows:

I don't have any feeling one way or another about Mr. Phillips' mother. I understand why he'd want to have his mother with him. While all their other witnesses I believe are alibi witnesses...

App. 72, l. 6-10

Two people were shot inside Nichols Nightlife Club on September 29, 2007. The evidence established that the shooter was identified as Scrappy, and that he fled the scene in a gold jeep with three other people inside the jeep. App. 125, l. 20 - p.129, l. 23; App. 178, l. 1 - p. 180, l. 11. Scrappy was allegedly petitioner's nickname. App. 257, l. 7 - p. 258, l. 20; App. 600, lines 3 - 25; App. 664, l 1 - p. 665. l. 9.

At trial, Conswella Smith testified that she was out on the town with Reginald Evans, and Jason, and petitioner at Nichols Club in Green, and that she was driving a Jeep Cherokee on that night, and that when she, Reggie, Jason and petitioner were in the jeep and ready to leave the

⁴ Lois Ann McLeod, Yolanda Phillips, Johnny McLeod, Stevie Riggins, and Merlin Ferguson. App. 10, l. 11-15; App. 72, l. 6-10.

club, petitioner went back into the club to use the bathroom, [and then] he (petitioner) came out and said “drive...I just merked two n___.” App. 597, l. 19- p. 608, l. 16.

Jason Phillips testified that he, Reginald, Conswella and petitioner, and Josh were inside the club on that night/morning, and that petitioner had to use the bathroom, and that afterwards (before leaving), he (Jason) heard gunshots and then saw petitioner running to the jeep, and that he then saw petitioner with a gun, which he (petitioner) later threw out of the window. App. 655, l. 3- p. 679, l. 18.

Eric Lorenzo Moultrie testified that he was housed in the same jail as petitioner and heard petitioner say that “he went inside [a bar] and [that] he robbed some man and some girl and shot them.” App. 714, l. 20- p. 719, l. 22.

During the PCR hearing, petitioner testified that counsel failed to present his alibi claim in his defense at trial, and that his alibi witnesses were at the courthouse waiting to testify, but that counsel never called them to testify during the trial. App. 869, l. 3-24. Petitioner listed the names of the alibi witnesses⁵ who would have been able to tell the truth about where he was located when the shootings in this case occurred. App. 871, l. 5- p. 872, l. 24; p. 899, l. 13-22. Petitioner stated that counsel advised that calling the alibi witnesses was not priority and that obtaining the last argument was the preferable strategy, which was a strategy that petitioner in effect did not view as favorable, and added that if he had known that counsel had not planned on calling forth the alibi witnesses, then he would have testified on his own behalf and presented his own alibi defense via his own testimony. App. 873, l. 5- p. 879, l. 24; Also, petitioner testified that he gave counsel that name of Caleb Bellamy as an alibi witness, but never knew whether

⁵ Johnny McLeod, Yolanda Phillips, Lois McLeod, Kayla Bellamy, Stevie Riggins, and James Riggins. App. 871, l. 8- p. 872, l. 2.

counsel interviewed Bellamy. App. 882, l. 2-19. Petitioner stated that counsel never even bothered to serve notice of the alibi defense. App. 882, l. 24- p. 883, l. 2.

Trial counsel Henry M. Anderson⁶ testified at the PCR hearing and explained that it was his understanding that the witnesses were interviewed by co-counsel Lawson based on the notes in the file, but that he (Anderson) did not recall a discussion with petitioner about his right to testify at trial. App. 902, l. 16- p. 903, l. 25; App. 910, l. 3- p. 915, l. 25. However, counsel admitted that the alibi witnesses were present at trial to be called and concluded that “if the alibi was ignored, it was because it wasn’t credible.” App. 919, l. 2- p. 921, l. 1; App. 929, l. 1-11. Anderson testified that the theory of the case was that reasonable doubt existed. App. 926, l. 15- p. 927, l. 16.

The PCR judge ruled that petitioner made the decision not to testify after being advised of his right to testify by the trial judge and that since counsels discussed with petitioner the issue of whether he should testify, then there was no deficiency on counsels’ behalf with respect to this issue; and also that counsels did not perform ineffectively with respect to the matter of the alibi presentation and investigation because said witnesses who were located were interviewed and because petitioner did not present the alibi witnesses at his PCR hearing. App. 949 – 964.

Counsel has a duty to conduct reasonable investigations in a criminal case. Strickland v. Washington, 4676 U.S. 668 (1984). This duty includes alibi evidence investigations. See Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), where the Court held that trial counsel was ineffective at a burglary and rape trial in failing to present an alibi witness who would have testified that he saw the defendant leave a lounge fifteen minutes prior to the conclusion of the time of the rape. Compare Grier v. State, 299 S.C. 321, 384 S.E.2d 722 (1989), where the Court

⁶ Petitioner was presented by Jack M. Lawson and Henry M. Anderson at trial, but Attorney Jack Lawson was deceased at the time the instant PCR hearing was held in this case.

held that counsel was ineffective in failing to call alibi witnesses for trial where the state's theory was that the defendant entered and robbed a convenience store and 3 a.m. because the defendant testified that he was home by 1 am on that morning, and also because his older brother would have testified that he saw the defendant sleeping in his room after 1 a.m., and his nephew would have testified that he was on the porch at 1 a.m. and saw the defendant arrive home at that time, and his younger brother would have testified that he helped the defendant inside the house after he came home as all of this collectively would have provided crucial proof in support of his alibi defense.

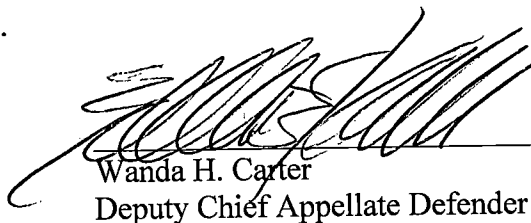
In addition, a defendant has a right to present witnesses in his defense. Faretta v. California, 422 U.S. 806 (1975). Thus, counsel's trial strategy to save the last argument by foregoing a valid alibi defense constituted deficient representation in violation of petitioner's Sixth Amendment right to competent legal representation at trial because the prejudicial value of the loss of the presentation of an actual defense (alibi) was great and the value of presenting an alibi defense might have yielded a different outcome at trial as opposed to and in comparison with any value gained in presenting the last argument to the jury. Moreover, but for counsel's error, a reasonable probability existed that the outcome of the trial would have been different had the alibi evidence been presented at trial. Trial counsel erred in denying petitioner the opportunity to present an alibi defense at trial.

Also, petitioner's right to testify at trial regarding his alibi claim should not have been suppressed by counsel. A defendant in a criminal case has the right to take the witness stand and testify in his or her behalf under the due process clause of the Fourteenth Amendment, which guarantees that no one shall be deprived of liberty without due process of law, and under the compulsory process clause of the Sixth Amendment that grants the defendant the right to call

witnesses, and under the Fifth Amendment's privilege against self-incrimination. State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), citing to Rock v. Arkansas, 483 U.S. 44 (1987), and Faretta v. California, 422 U.S. 806 (1975). In Rivera, the Court reversed because the defendant's was denied his right to testify in his defense at trial (despite the position that **"preventing [the defendant] from testifying may have been an advantageous strategic decision ...[because this position]..had no basis in the law]"** and that the denial of the right to testify at trial could not have been harmless as it was considered structural error. In addition, a defendant has a right to present his defense at trial. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (2001). Here, counsel's failure to present an alibi defense on petitioner's behalf at trial constituted ineffective assistance of counsel in violation of the Sixth Amendment. See, Strickland v. Washington, 466, U.S. 668 (1984). Finally, but for counsel's omission in this regard, a reasonable probability exists that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the forgoing argument, petitioner requests that the Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Honorable Thomas A. Russo, Circuit Court Judge

JOSHUA LEE PHILLIPS,

PETITIONER

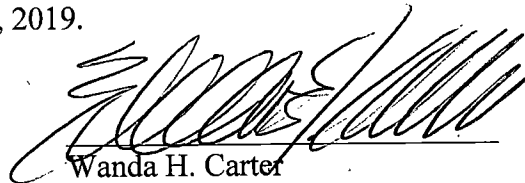
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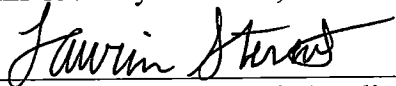
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Joshua Lee Phillips, #312606, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of March, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 15th day of March, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.