

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Larry B. Hyman, Circuit Court Judge

RECEIVED

MAR 29 2019

BILLY L. ALFORD,

PETITIONER ^{S.C.} SUPREME COURT

V.

STATE OF SOUTH CAROLINA (2),

RESPONDENT

APPELLATE CASE NO 2018-001430

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to investigate into and work independently to locate cell phone records that would have established an alibi defense in petitioner's case.

STATEMENT

Petitioner Billy Leon Alford entered a plea to second degree assault and battery during the November 2011 term of the Horry County General Sessions Court before Judge Edward B. Cottingham and was sentenced to imprisonment for a term of eighteen years. App. 1-11. Paola C. Pinzon represented petitioner at the plea proceeding and Assistant Solicitor J. Stephen Grooms appeared on behalf of the state. Petitioner appealed, but the appeal was dismissed as untimely filed. On March 26, 2012, the Court denied the request to reinstate the appeal.

Petitioner filed three PCR applications.¹ The Respondent filed Returns on October 7, 2012, and May 5, 2016. App. 20-25. A PCR hearing was convened on May 24, 2018, at the Horry Court Courthouse before Judge Larry B. Hyman, Jr. Petitioner was present at the hearing and represented by James K. Falk, and Assistant Attorney Johnny E. James appeared on behalf of the state. App. 27-86. On June 17, 2018, Judge Hyman issued an Order of Dismissal in the case. App. 95-105.

Petitioner appealed Judge Hyman's Order of Dismissal. This petition follows.

¹ 2011-GS-26-2121 and 2012-CP-26-5785 and 2015-CP-26-7716 (App.13-19). The instant PCR appeal is for action number 2015-CP-26-7716.

ARGUMENT

Trial counsel erred in failing to investigate into and work independently to locate cell phone records that would have established an alibi defense in petitioner's case.

During the plea proceeding, the solicitor apprised the trial judge of the facts of the case. Apparently, petitioner connected with a woman online, and the woman alleged that on March 29, 2011, petitioner "did strike her in the face" after confronting her about "leading him on." App. 3, l. 14-25.

During the PCR hearing, petitioner testified that trial counsel performed ineffectively with respect to investigating and securing documentation, i.e., phone records, in support of his alibi defense claim. Petitioner explained that his cell phone records from Verizon would have established his incoming calls showing that he was not there where the assault allegedly took place at River Walk on Elm Street in Conway. To the contrary, petitioner was elsewhere at Surfside in Socastee (off Forrest Brooks Road at nephew's house) in a totally different part of Horry County; and therefore, via his alibi, he could not have assaulted the named woman in the indictment. Petitioner testified that he had been on the phone with said woman, but they were in separate places and his incoming calls starting at 9:09 to 9:26 on March 29, 2011, and the records he produced at the PCR hearing (see Applicant's Exhibit #1 at App 88 – 91) demonstrated his claim that she called from West Myrtle Beach and he was elsewhere, i.e., Surfside Beach. Had counsel investigated and obtained these phone records, then an alibi defense could have been developed. App. 37, l. 2- p. 43, l. 10. At the PCR hearing, the phone records were produced confirming the alibi. App. 88-91.

Petitioner added that the state's documents showed no calls (deleted) on March 29, 2011; and that without the production of the accurate phone records, which counsel did not

independently obtain, then he had no alibi defense and was coerced into pleading guilty. App. 70, l. 25- p. 71, l. 2; App. 76, l. 17-App. 43, l. 13- p. 44, l. 25. Apparently, counsel failed to check the records under the name of petitioner's aunt which was revealed at the PCR hearing. App. 76, l. 16- p. 83, l. 21.

Trial testified at the hearing and explained that petitioner's phone records from her file showed no phone activity on March 29, 2011, and that she had no other information available in the case. App. 50, l. 7-p. 54, l. 24; App. 59, l. 4- p. 63, l. 6.

The PCR judge ruled that petitioner proved no deficiency on counsel's behalf with respect to the failure to investigate into the phone records evidence. App.102 – 105.

Counsel has a duty to make reasonable investigation in criminal cases. Strickland v. Washington, 466 U.S. at 691 (1984). This holds true in cases where defendant raises an alibi claim. See Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), where the Court held that counsel's failure to interview the defendant's former girlfriend as a potential alibi witness constituted error and prejudice resulted where she stated that she and the defendant spent weekends together and that he could not have been present at the gas station when the crimes were committed, which meant if there had been truth to the former girlfriend's assertions then he could not have committed the crimes. Walker modified Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), to the extent that it changes the rigid theory that an alibi that leaves open the possibility for the defendant to be guilty is not an alibi at all, because an alibi may still exist.

Compare 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 also, Grier v. State, 299 S.C. 321, 384 S.E.2d 722

(1989), where the Court 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.

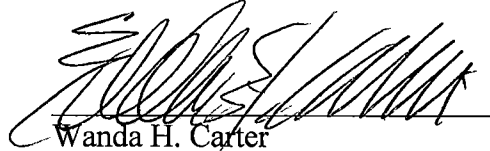
Note the holding in Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), where the Court ruled that the PCR applicant must produce the favorable witness and favorable testimony to establish deficient representation and the resulting prejudice. The witness in Walker (former girlfriend) testified at the PCR hearing. Note further that the production of favorable evidence at PCR works to the advantage of the applicant if the same is presented at trial. See Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), and Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (2014). In Pauling, the Court held that the PCR applicant established prejudice where the nurse's notes presented at the PCR hearing corroborated lack of penetration in the sexual assault case. In Bagwell, the Court held that trial counsel was ineffective in deciding not to seek DNA testing of blood found on pieces of glass from the victim's patio glass door because the state relied on the bloody pieces of glass as circumstantial evidence of the victim's guilt because the results would have supported the defendant's alibi defense at trial; and therefore, counsel had a duty to make an investigation into such forensics in the case. Here, petitioner produced the cell phone records.

In the case at bar, counsel failed to adequately investigate into the existence of the very same cell phone records, which were found and presented at petitioner's hearing, because these

were records establishing and verifying petitioner's alibi defense; and also, counsel's failure to do so constituted ineffective legal assistance in petitioner's case, and the prejudice was obvious in that the outcome of his legal case would have been more favorable but for counsel's omission.

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

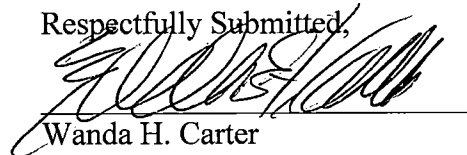
Counsel for Billy L. Alford states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Larry B. Hyman, which was held on May 24, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Billy L. Alford.

Respectfully Submitted,

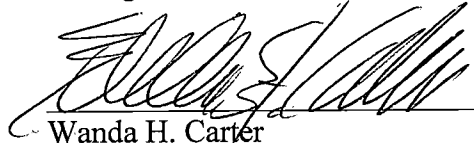


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of March, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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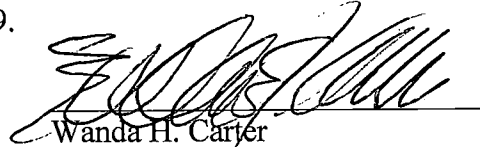
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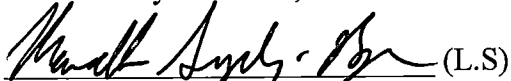
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Billy L. Alford, #, at 6157 Sweet Home Church Road, , Myrtle Beach, SC 29578, this 29th day of March, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 26, 2028.